E. C. Waste, Inc. d/b/a Waste Management de Puerto Rico *and* Union de Tronquistas de Puerto Rico Local 901, IBT, AFL–CIO. Cases 24–CA–8786 and 24–RC–8138

June 13, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On September 10, 2001, Administrative Law Judge William N. Cates issued the attached decision. Respondent filed exceptions[1] and a supporting brief. The General Counsel filed an answering brief, and Respondent a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the judge's recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that Respondent, E. C. Waste, Inc. d/b/a Waste Management de Puerto Rico, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the following for paragraph 2(f).

"(f) Within 14 days after service by the Region, post at its office at Humacao, Puerto Rico, copies of the attached notice marked "Appendix"[4] in both Spanish and English.[5] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by Company's authorized representative, shall be posted by Company and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Company has gone out of business or ceased its operation at the facility involved in this proceeding, the Company shall duplicate and mail, at its own expense, a copy of the notice in both Spanish and English to all current employees and former employees employed by Company at any time since October 18, 2000, the date of the first unfair labor practice found in this proceeding."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER ACOSTA, concurring.

I agree with my colleagues that the Respondent discharged Blanca Santana on October 26, 2000, in violation of Section 8(a)(3) and (1) of the Act, and I also agree that Marilyn Diaz is not a confidential employee under the Act.[1] I write briefly on certain aspects of the Santana discharge allegation.

[1] Respondent excepts only to the judge's findings that Blanca Santana was unlawfully discharged (sec. D of the judge's decision), and that Marilyn Diaz is not a confidential employee (sec. E,4 of the judge's decision).

[2] Respondent defended its discharge of Blanca Santana in part on an interpretation of probationary employment periods required by Puerto Rico Law Ann. Tit. 20 § 80 (2000). Respondent's brief challenges the judge's statement that the parties should have stipulated to the authenticity of a copy of the statute and entered it into the record. We agree with Respondent that the judge could have taken official notice of the statute. His failure to do so was not prejudicial, however, in light of the judge's ultimate findings, which we affirm, that Respondent's shortening of Santana's probationary period in alleged reliance on the statute and its reliance on her alleged attendance problems were a pretext for unlawful antiunion motivation.

We adopt the judge's finding that Marilyn Diaz is not a confidential employee. To qualify as a confidential employee, an individual must (1) share a confidential relationship with managers who "formulate, determine, and effectuate management policies in the field of labor relations"; and (2) assist and act in a confidential capacity to such managers. *NLRB v. Hendricks County Rural Electric*, 454 U.S. 170, 189 (1981); *Ford Motor Co.*, 66 NLRB 1317, 1322 (1946). Respondent failed to prove that District Manager Manuel Fresneda and Human Resources Manager Wilma Figueroa "formulate[d], determine[d], and effectuate[d] management policies in the field of labor relations." Id. Even presuming they did, however, Respondent failed to prove that Diaz assisted and acted in a confidential capacity to them. Assuming Diaz' responsibilities include some labor relations work, those responsibilities do not qualify her as a confidential employee because she does not work on labor relations issues on a regular basis. *Los Angeles New Hospital*, 244 NLRB 960, 961 (1979).

[3] We have modified the judge's recommended Order and notice in accordance with *Ferguson Electric Co.*, 335 NLRB 142 (2001), and *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), respectively.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[5] In accordance with the General Counsel's request and in light of the number of Respondent's employees who are Spanish-speaking, the notice to be posted shall be in Spanish as well as English. See *Tres Estrellas De Oro*, 338 NLRB 503 (2002).

[1] In finding that Diaz is not a confidential employee, I agree with my colleagues that she does not share a confidential relationship with man-

1. In assessing Santana's discharge, I note initially, as did the judge, the significant union animus displayed by the Respondent at the time contemporaneous with Santana's discharge. That animus is detailed by the numerous 8(a)(1) findings by the judge, to which the Respondent has taken no exception. Thus, the judge found that during the Union's organizing campaign, the Respondent's district manager, Manuel Fresneda, requested that employee Iris Andrews report on other employees' union activities. At an employee meeting, Fresneda and headquarter's human resources manager, Wilma Figueroa, threatened employees that they would be bargaining from zero with no paid benefits. These two corporate managers likewise solicited employee complaints and grievances and impliedly promised to remedy them if employees rejected the Union. In addition, Figueroa questioned employees about the identity of the Union's in-office organizer. Finally, Figueroa, in a one-on-one interview with employee Andrews, asked about her opinion of the Union, and implied that the union activity of other employees was under the Respondent's surveillance. These unfair labor practices give significant meaning and dimension to Santana's discharge.

2. The Respondent contends that it had no knowledge of Santana's union activities. While the quantum of Santana's union activities was not significant, she intended to vote for the Union in the election scheduled for November 21, 2000. The judge found that the Respondent knew that fact because she had told it to Iris Andrews, the coemployee whom the Respondent had recruited to report to it the names of any employees talking about the Union. The judge inferred that Andrews in turn reported to the Respondent the information that Santana had revealed to her and I accept that as a valid inference.[2]

3. The Respondent argues that, on the same day that it fired Santana, it also fired Andrews. It argues that Andrews was hired on the same day as Santana under similar circumstances and was let go for the same nondiscriminatory reason, i.e., a failure to "approve" (i.e., complete) her probationary period. Further, it posits that since Andrews had agreed to "spy" for the Respondent, it could assume that Andrews would vote against the Union in the election. Thus, firing her resulted in the loss of a "no" vote. This fact, the Respondent argues, shows that its firing of both employees was equally benign and not in violation of the Act. I reject this argument. That Andrews' vote was a sure "no" vote is not demonstrated in the record but that Santana planned to vote *for* the Union is, in fact, established by the record as is the Respondent's knowledge of her intended vote. It is further established by the record, as found by the judge, that the Respondent's offered reason for terminating Santana, i.e., that she had "demonstrated a pattern of absenteeism" was a pretext.[3] I am satisfied that its offered reason was a pretext for unlawful antiunion motivation. Thus, the Respondent has not shown that the situation of Santana and Andrews were sufficiently similar to demonstrate that the discharges of both were equally nondiscriminatory.

In sum as found by the judge and my colleagues, I agree that Santana's discharge violated the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with, restrains, or coerces you with respect to these rights, and more specifically:

WE WILL NOT coercively question you about your union activities.

WE WILL NOT threaten you with various economic sanctions should you vote for Union de Tronquistas de Puerto Rico Local 901, IBT, AFL–CIO (Union), or any other union, to be your collective-bargaining representative.

WE WILL NOT implicitly solicit your complaints and grievances during a union organizing campaign when

agers who formulate, determine, and effectuate management policies in the field of labor relations. Accordingly, I find it unnecessary to determine whether she assists and acts in a confidential capacity to such managers.

[2] The judge also inferred that, due to the small size of the unit, the Respondent was further aware of Santana's union sentiments because she took smoke breaks with Angie Santiago, the Union's in-plant organizer. I do not rely on that inference.

[3] In agreeing that the Respondent's offered reason was a pretext, however, I do not rely on the judge's observations regarding the Respondent's December 18, 2000 position letter set out at sec. D,6, par. 5 of his decision.

there is no past practice of our doing that when there is no union organizing campaign in progress.

WE WILL NOT create the impression among you that your union activities are under surveillance by us.

WE WILL NOT ask you to spy on the union activities of your fellow workers, to identify the union supporters, to note what they are saying about the Union, or any union, and impliedly ask that you report that information to management.

WE WILL NOT discharge you or otherwise discriminate against any of you for supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Blanca Santana full reinstatement to her former job, and if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed.

WE WILL make whole Blanca Santana for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Blanca Santana, and WE WILL within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

E. C. WASTE, INC. D/B/A
WASTE MANAGEMENT DE PUERTO RICO

Lourdes Vanessa Garcia, Esq., for the General Counsel.
Luis Perez Giusti, Esq., of Hato Rey, Puerto Rico, for the Company.
Juan M. Negron, of San Juan, Puerto Rico, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a discharge case in the context of a union organizing campaign. The outcome of a Board-conducted election of November 21, 2000, depends on resolution of the challenged ballots of three persons, including Blanca R. Santana.[1] The Company discharged Santana but denies that union activities had anything to do with her discharge. Finding in favor of the Government as to Santana, I shall order the Company to offer her reinstatement and to make her whole, including interest. Respecting the challenged ballots, I shall recommend to the Board that it direct the opening and counting of Santana's ballot and the ballot of Marilyn Diaz, for the record fails to establish that Diaz was a confidential employee at the time of the election. I shall recommend that the challenge to the remaining ballot (that of Keila Ramos) be overruled and that her ballot be opened and counted. Ramos' ballot was challenged on the basis that, as of the election, Ramos was a managerial or supervisory employee, a challenge I find to be unsupported by the evidence.

I presided at this 2-day trial in San Juan, Puerto Rico, on June 11–12, 2001. Trial was pursuant to the March 1, 2001 Order consolidating cases, and the February 28, 2001 complaint (complaint) issued by the Acting General Counsel of the National Labor Relations Board through the Regional Director for Region 24 of the Board (Government). The complaint is based on an unfair labor practice charge, as later amended, filed November 8 by Union de Tronquistas de Puerto Rico, Local 901, IBT, AFL–CIO (Union), against E. C. Waste, Inc. d/b/a Waste Management de Puerto Rico (Company). The unfair labor practice case is consolidated with Case 24–RC–8138 in which the Acting Regional Director, on December 27, issued her report and recommendation on challenged ballots and notice of hearing (report).

The pleadings establish that the Board has both statutory and discretionary jurisdiction over the Company, a Puerto Rico corporation, with an office in Humacao, Puerto Rico, and that the Union is a statutory labor organization. The Company collects and disposes of industrial and commercial waste.

As is reflected in the Acting Regional Director's report, on October 26, the Regional Director approved a Stipulated Election Agreement executed by the Union and the Company. Pursuant to the stipulated agreement, NLRB Region 24 conducted a secret-ballot election on November 21 among the Company's employees in an office clerical unit.

The tally of ballots, as the Acting Regional Director's December 27 report discloses, revealed that of some 11 eligible voters, and no void ballots, 4 votes were cast for the Union, 3 against, and 4 ballots were challenged. The challenges are sufficient in number to affect the results of the election. As the report further discloses, at the election the Board agent challenged the ballots of Blanca Santana, Iris Andrews, and Marilyn Diaz on the ground that the three were not on the list of eligible voters. The Union challenged the ballot cast by Keila Ramos on the basis that Ramos was a managerial employee. ("Keila" is the spelling shown in the record. Although, on brief, Company spells Ramos' first name as "Keyla," which may be correct, in the absence of a stipulation I leave the spelling as it is rendered in the record.)

The Acting Regional Director's investigation disclosed that Santana and Andrews had been terminated on October 26, and the unfair labor practice charge filed November 8 in Case 24–CA–8786 alleged that their discharges violated the Act. Accordingly, pending the disposition of the charge in Case 24–CA–8786, the Acting Regional Director held in abeyance a determination on the eligibility of Santana and Andrews. As the Acting Regional Director's investigation further disclosed, the Company disputes that Ramos is either a managerial or supervisory employee, and the Company contends, contrary to the Union, that Diaz is a confidential employee. Finding that the challenge to the ballots of Ramos and Diaz raise substantial and material issues of fact and credibility which could best be resolved on the basis of record testimony, the Acting Regional Director directed a hearing respecting the challenges to the

[1] Unless otherwise indicated, all dates are for 2000.

ballots of Marilyn Diaz and Keila Ramos. By its second amended charge filed January 31, 2001, the Union removed Iris Andrews from Case 24–CA–8786. Thus, in the February 28, 2001 complaint, the only alleged discriminatee is Blanca Santana. As noted earlier, on March 1, 2001, the Regional Director consolidated the representation case and the unfair labor practice case for trial.

In addition to alleging that the October 26 termination of Blanca Santana was unlawful, the complaint also recites a dozen counts of mid-October statements by officials of the Company that allegedly are coercive under Section 8(a)(1) of the Act. By its answer, the Company denies violating the Act in any manner.

The trial was divided into two parts—the unfair labor practice portion and the election portion, with the two parts having a total of three stages. Twelve witnesses testified (some more than once) before me in evidentiary stages dictated as follows, with the party having the burden of proof taking the lead. The unfair labor practice case was presented first, with the Government calling three witnesses and then resting. The Company followed with five witnesses and then rested. The second part, the election portion, had two stages. The first stage was devoted to the Union's challenge of Keila Ramos' ballot. In this Ramos stage the Union called two witnesses and the Company four. The parties then rested their cases as to the Ramos challenge. The third stage, addressing the Company's challenge to the ballot of Marilyn Diaz, saw the Company call two witnesses and the Union one, with the parties then resting as to the Diaz challenge. No separate rebuttal was presented at any of the three stages of the trial. Most of the testimony was given through an interpreter (English to Spanish and Spanish to English). Following the parties' resting as to the Diaz challenge, I set the date for receipt of briefs and closed the trial.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the post-trial briefs filed by the Government and by the Company, I make the following

FINDINGS OF FACT

A. The Company's Operation

The Company's Puerto Rico operation is under the management of a regional vice president. The administrative headquarters for Puerto Rico are located in Caguas. In Puerto Rico, the Company has seven locations, with five of them designated as districts. The district involved here is located at Humacao. Jose Rodriguez, the controller for the Humacao district, has his office at Caguas, as does Wilma Figueroa, the Company's human resources manager for all of Puerto Rico. Manuel Fresneda, the district manager for the Humacao district, works at the Humacao office. Milisha Gonzalez is the staff accountant in the accounting department at Humacao. She reports to both the controller, Jose Rodriguez, and to District Manager Fresneda. Several unit employees work under the supervision of Staff Accountant Gonzalez.

Human Resources Manager Wilma Figueroa testified that each district has a person serving as the human resources liaison who does payroll and handles all other personnel issues that arise in the district. Figueroa reports that her liaison assistant in Humacao is Marilyn Diaz. Diaz asserts that she is merely an office clerk.

Blanca Santana began work at the Humacao office as an accounting clerk in April as a temporary worker from Kelly Services. On September 11, Santana accepted an offer of regular employment, at a substantial pay raise, from District Manager Fresneda and Staff Accountant Gonzalez to fill a vacancy as the accounts payable clerk. As a new regular employee, Santana normally would have a probationary period of 3 months, ending on December 11, as is shown on a personnel form in evidence. I discuss this topic in more detail later.

Mayra Maldonado is the Company's customer service manager and sales manager. She reports to Regional Vice President Joe Ruiz. (Figueroa informs us that, about the time of the trial, Ruiz was being succeeded by Jose Cardona.) Assisting Maldonado on the customer service side are five customer service representatives—one in each of the five districts. Keila Ramos is the customer service representative assigned to Humacao, and she reports to District Manager Fresneda and also to Maldonado. Ramos asserts that she does not supervise anyone.

At least as to the Humacao district, the Company, as District Manager Fresneda reports, operates its business through two companies (possibly unincorporated divisions), those being a transportation, or hauling division, and a division that operates the sanitary fill or landfill. As to the transportation company, Fresneda and Human Resources Manager Figueroa advise that the Union enjoys a collective-bargaining agreement with the Company covering the drivers. (On Br. at 20 fn. 5, the Company asserts that the contract also covers the mechanics. That may well be so, but such is not shown in the record.)

B. The Union's Organizing Campaign

In Case 24–RC–8138, the Union's election petition, a copy of which is in evidence, was filed on October 13 and served on October 16. Angie Santiago, who works as a purchasing agent for the Company, and who had been the Union's observer at an election held at the Company in 1998, contacted Juan Negron of the Union about mid-September, distributed and collected authorization cards on October 7 and 8, signed her own card on October 11, and again served as the Union's observer at the election on November 21.

Santiago did not give a card to Blanca Santana because of a perceived friendship that Santana had with Iris Andrews who in turn, Santiago perceived, had a friendship with District Manager Fresneda. (As we see later, Andrews felt much loyalty toward Fresneda, viewing him almost as a son.) Instead, Santiago determined from their conversations at outside smoke breaks that Santana would vote for the Union. In one conversation in the lunchroom Iris Andrews was present when Santana asked Santiago if the situation with the Union was going through. Santiago replied yes, that they simply were waiting for a date for the election. Santiago and Santana worked closely together. As Santiago describes, Santana, working as the accounts payable clerk, paid the bills that Santiago generated. As both Santana and Santiago report, they had to converse daily about their work, such as discussing invoices.

C. Alleged Acts of Coercion

1. Introduction

"About October 12," and "about mid-October," complaint paragraph 6 alleges District Manager Fresneda and Human Resources Manager Figueroa made a dozen different coercive statements. Although the evidence focused on the following week, and principally the date of October 19, no objection was made as to a time variance. Moreover, as the allegations are to an "about" date, a week later is close enough to fit the allegation in any event. Four incidents (the number is disputed) are involved here. One is a staff meeting on October 19, and the other three are one-on-one conversations.

2. Manager Fresneda recruits Iris Andrews to spy

a. Facts

In a fashion similar to that of Blanca Santana, Iris Andrews began working for the Company through Kelly Services about May, and on September 11, she too was hired by the Company as a regular employee. Andrews also was fired on October 26, as was Santana. (As mentioned earlier, Andrews' name was amended out of the instant charge on January 31, 2001.)

During the week before her discharge,[2] Andrews testified, Andrews was in Fresneda's office discussing with him a customer's account. Abruptly Fresneda told Andrews to close the door because he wanted to talk with her. Fresneda then asked Andrews whether she had heard about the Union and who was talking about the Union. Andrews said that she had an idea but was not sure.

Fresneda then told Andrews that, since Andrews and "Blanca" (Santana) were friends, for Andrews to try to convince her not to vote for the Union. Andrews said she would talk with Santana, but if Santana already had her opinion Andrews would be unable to change it. (As Santana reports, a few days after the October 19 staff meeting, when Santana and Andrews were at lunch, Santana asked Andrews whether she had told anyone that Santana was going to vote for the Union. Andrews replied that Manuel Fresneda had asked her to see if she could change Santana's mind. Andrews told Fresneda that, even though she and Santana were friends, she could not make Santana change her mind because that is the way she thought. Because there was no objection to this hearsay testimony, I shall give it "such weight as its inherent quality justifies." *Midland Hilton & Towers*, 324 NLRB 1141 fn. 1 (1997). In so considering it, I note that Santana's report corroborates the testimony of Andrews.)

Fresneda further said that he wanted Andrews to observe who talked about the Union, to identify them, and to note what they were saying about the Union. Andrews asked Fresneda if he wanted her to be like a spy, and Fresneda replied, "Something like that." She stated that such would create a lot of enemies for her among her workmates. Fresneda said he needed her help. Although at the moment she was not for the Union, because she wanted to help Fresneda, she told him, "Okay, it's fine."

As Andrews explains at trial, she loved Fresneda like a son. In those days Andrews would do anything for Fresneda. As we see later, concerning an incident on October 20 involving a sworn (but materially false) statement allegedly coerced from Andrews by Fresneda in order to discriminate against another employee because of her union activities, Andrews admits at trial that she agreed to lie (in the affidavit) for Fresneda. She did so because, "Back then I was willing to do everything Manolo [Fresneda's nickname] wanted. Yes, because of what I felt for Manolo." As Andrews explains moments later, she really was not lying because she was helping Fresneda "so the Union would lose strength and weaken and that's what he wanted."

Andrews asserts that her testimony at trial is not a lie because she still feels the same affection for Fresneda, although she pities him for the mess that he has gotten in by following the wrong people. Acknowledging that she and Santana are still friends to this day, Andrews asserts that she would not lie for Santana "because she's a very honest person."

For his part, District Manager Fresneda generally denies meeting privately with Andrews to talk with her about union affairs other than the occasion when she gave an affidavit. The occasion of the affidavit is a separate meeting described by both Andrews and Fresneda, and also by the attorney who took the statement and notarized it. On cross-examination, Fresneda concedes that he would meet daily with Andrews, in private, on business matters.

b. Discussion

Iris Andrews described the meeting of October 18 (as I have designated the date) in detail. She testified favorably and with a persuasive demeanor. In contrast, District Manager Fresneda gave only a general denial, and his demeanor was unfavorable. In crediting Andrews' account, I have weighed her admission that she lied in the sworn statement that she gave to the Company concerning Angie Santiago, an incident that I summarize later. With complete candor, Andrews explains her motivation (in essence, doing what Fresneda wanted because of her strong maternal affection for him), and further explains that her trial testimony is truthful because she retains her affection for Fresneda notwithstanding her discharge. Additionally, in observing Andrews testify, and in considering her demeanor, I looked for any sign of resentment lingering from her own discharge. Observing no such sign, and finding that Andrews testified with specificity and sincerity, I credit her account.

Having credited Andrews' account of the October 18 conversation with District Manager Fresneda, I find that "about mid-October" the Company, by District Manager Fresneda, "interrogated its employees" concerning which employees were talking about the Union. Although complaint paragraph 6(f) alleges an interrogation of employees "about their union sympathies," and the evidence is that the interrogation went to the union activities of other employees,[3] there was no objection.

[2] For convenience of reference, I designate this occasion as the incident of October 18.

[3] I do not overlook the brief question to Andrews of whether she had heard about the Union. Under the circumstances, that brief question

The difference is more technical than substantive, and in any event I find that it was tried by implied consent. I therefore find that the interrogation, asking for, in effect, the names of any employees talking about the Union, reasonably would tend to be coercive because of its chilling nature. By District Manager Fresneda's coercive interrogation of employee Iris Andrews on October 18, the Company, I find, violated Section 8(a)(1) of the Act.

The portion of the conversation containing Fresneda's request that Andrews spy on the union activities of her workmates, and impliedly to report such information to Fresneda, fits the allegation of complaint paragraph 6(g) that the Company thereby "requested its employees to ascertain and disclose to Respondent the union membership, activities, and sympathies of other employees." By District Manager Fresneda's October 18 request that Andrews spy on the union activities of other employees, the Company violated Section 8(a)(1) of the Act.

3. The staff meeting of October 19, 2000

a. Introduction

Five counts of the complaint's coercion allegation (paragraph 6) are devoted to the staff meeting conducted on October 19 by District Manager Fresneda and Human Resources Manager Figueroa. Most members of the bargaining unit were present. The first two counts allege that the Company, by Fresneda, threatened its employees "with bargaining from scratch if the Union came in" (complaint par. 6(a)), and (par. 6(b)) "with loss of benefits if the Union came in."

The next three counts allege that the Company, by Figueroa, "implicitly threatened and/or threatened its employees with loss of employment" (par. 6(c)), "implicitly solicited employee complaints and grievances" (par. 6(d)), and (par. 6(e)), interrogated its employees about their union activities." To prove these allegations, the Government elicited testimony from Blanca Santana and Purchasing Agent Angie Santana. For support of its denials, the Company adduced testimonial evidence from Human Resources Manager Figueroa, Jessica Alejandro (who succeeded to the position of accounts payable clerk after Santana was fired), and by District Manager Fresneda.

Certain general matters are, for the most part, not disputed. First, the meeting began with District Manager Fresneda and Human Resources Manager Figueroa presiding. Fresneda began by stating that the purpose of the meeting was to inform the employees that the Union had petitioned to represent them. Aside from any disputed matters, Fresneda then generally described the petition and election process. Fresneda's presentation was followed by comments from Figueroa, including remarks about benefits. Near the beginning of Figueroa's remarks, which entered the area of whether employees had any problems at work, Figueroa asked Fresneda to step outside the room so that the employees would feel free to discuss any of these problems.[4]

Respecting the disputed matters, I credit the Government witnesses' Blanca Santana and Angie Santiago. They testified with specifics and in a convincing fashion. By contrast, the Company's witnesses offered general denials. For example, Alejandro was asked whether, during the staff meeting, she heard Fresneda "make any threats about bargaining from scratch or any threats at all about the Union." To this Alejandro replied, "There was no threats at all, none." Thus, the findings I make on disputed matters are based on the credited descriptions given by Santana and Santiago, plus any consistent testimony by Figueroa, Alejandro, or Fresneda.

b. Facts

As Blanca Santana reports, District Manager Fresneda told the group of employees that if the Union entered the Company that they would begin (their bargaining) "at zero." The employees would not have the same benefits as before. There would be no paid ("pay") benefits,[5] and the Union could give no assurances regarding the employees' jobs. In fact, as Angie Santiago describes, when the employees entered the conference room there already was depicted on the blackboard a comparison of benefits, with those of the Company on one side and on the other side of a middle line the same benefits but with zeros shown.

Apparently even before Fresneda stepped outside, Figueroa reiterated Fresneda's statement that with the Union in the Company, the employees would start with no paid ("pay") benefits, and the Union could give no assurances regarding the employees' jobs. Figueroa also said that the Company could do without the services of any employee by simply firing "them." And if the fired employee proceeded with a lawsuit, over her discharge, the Company was a "multi million dollar Company and could meet any lawsuit payments."

At some point during the portion of time devoted to bargaining and benefits, someone, presumably Figueroa, distributed copies of a one-page comparison of the benefits of "The Company" against those "With the Union." With the page divided in half by a vertical line, "The Company" benefits are listed on the left, and those "With the Union" are shown on the right. Figueroa testified that she prepared the comparison, obtaining figures for the Union from a contract that the Company has with the Union covering, presumably, the drivers of the Company's transportation division.

It is clear that the benefit sheet given to the employees that day is not what appeared on the blackboard. On cross-examination, Figueroa concedes that the sheet is different. Indeed, Jessica Alejandro advises that none of the information on the sheet of paper appeared on the blackboard. Whether none of the information was reproduced I need not reach. It is enough to find, as I do, that for their talking points about bar-

would not reasonably be coercive. The vice is in the next question that asked for the identities of those employees talking about the Union.

[4] Fresneda recalls that it was the employees who asked him to step outside. However, even Figueroa and Alejandro assert that Figueroa asked him to do so.

[5] Although Santana's interpreted testimony is rendered as "pay benefits," I find, from the context, that the statement delivered by Fresneda, and later by Figueroa, was "paid benefits."

gaining starting from zero, and with no paid benefits, District Manager Fresneda and Human Resources Manager Figueroa, used what was displayed on the blackboard, and not what is written on the sheet of paper that was distributed at the meeting.

As Santana describes, Figueroa told the group that when a union seeks to attach itself to a company, it is because there are problems at the company.[6] So, Figueroa asserted, she was there to learn what the problems were. Figueroa then asked Santiago, "Is there any problem?" When Santiago did not answer, Figueroa asked again, "Are there any problems?" Still Santiago would not answer.

At that point Figueroa, commenting that Santiago would not speak because Fresneda was present, asked Fresneda to step outside. When Fresneda departed, Figueroa asked, apparently to the group generally, "Tell me what the problems are. Do you want money?" Apparently receiving no response, Figueroa then leaned on the glass table and, facing Santana, asked, "Blanca, is there any problem? Tell me." Observing that Figueroa was so insistent, Santana replied that she was satisfied with her pay, having received a raise to $7 an hour, got along with her fellow workers, and had no problem. Figueroa apparently stated to the group, "Tell me, is there any problem?" Then turning to Santiago, Figueroa said, "Angie, do you have anything to say?" As Santiago tells us, "I said nothing." While at various times Figueroa would express herself to the group, most of her questions, as Santiago credibly reports, "were to me and Blanca." Santana confirms this.

After Santiago declined to answer Figueroa's question to Santiago, Iris Andrews and Santiago had a brief exchange, apparently not entirely friendly, which concluded with Andrews telling Santiago, "I'm not saying you're the delegate." Latching on to this, Figueroa stated that she did not know who was the Union's delegate. She asked whether anyone knew. Apparently receiving no answer, she then asked Andrews whether she knew whom the female delegate is, observing again that she did not know. Still no one, apparently, answered. Andrews did not cover this matter, or the meeting itself, during her own testimony.[7] With the Company's counsel reading the complaint allegations, Figueroa denied the allegations against her.

According to District Manager Fresneda, he returned for a question and answer portion of the meeting where he answered many questions. Fresneda claims that the point at which Santana voiced her satisfaction with her job occurred during this question and answer segment, and that Santana's satisfaction remarks were volunteered and not in response to any question. Fresneda's testimony in this area does not fit with the testimony of any of the other witnesses. To the extent that the meeting had a third segment of questions and answers, at which Fresneda was present and answered many questions, I find that such occurred after the "problems" portion when Fresneda, at Figueroa's request, excused himself. I further find that Fresneda, later learning about Santana's statement of satisfaction, transferred it to the question and answer segment. That he was not present when Santana made it is underscored by his testimony that she volunteered it, and that it was not in response to any question. Before me, District Manager Fresneda was not a credible witness.

c. Discussion

Respecting the bargaining "from zero" comments by District Manager Fresneda, as reinforced by Human Resources Manager Figueroa, the law is well settled. If the nature of the employer's statement is that the bargaining procedure means that employees lose what benefits they have and must bargain to restore them, the statement is an unlawful threat. *Webco Industries*, 327 NLRB 172, 180, 189 (1998); *Williamhouse of California*, 317 NLRB 699, 702–703, 714–715 (1995). As this is what was said here, as opposed to a mere figure of speech used during a description of give-and-take bargaining,[8] the statement violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 6(a) and conclusory paragraph 8.

With that unlawful statement as a preface, Fresneda's next remark (also repeated by Figueroa), that there would be no paid benefits, meant that the employees would start their bargaining by losing all their paid benefits. That simply is another way of stating that bargaining starts from zero, but it does so even more directly. The statement also violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 6(b).

Human Resources Manager Figueroa's statement that the Company could do without the services of any employee simply by firing him or her falls short of a threat to discharge an employee because of her union activities. Accordingly, I shall dismiss complaint paragraph 6(c).

Turn now to the allegation that Figueroa implicitly solicited employee complaints and grievances. On this the law is firmly established. In the absence of evidence showing such a previous practice, the solicitation of grievances during an organizing campaign accompanied by a promise, express or implied, to remedy such grievances, violates the Act. Moreover, the solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances, although this inference is rebuttable. The employer may rebut by showing a legitimate business justification for the challenged matter. *Kofy TV-20*, 332 NLRB 771 (2000); *Health Management*, 326 NLRB 801 (1998); *Torbitt & Castleman*, 320 NLRB 907, 909–910 (1996), enfd. denied on this point 123 F.3d 899, 907–908 (6th Cir. 1997) (court finds employer rebutted inference).

There is no showing here that the Company had a practice of soliciting grievances or "problems." And here the repeated solicitations at the meeting are tied directly to the presence of the Union (on Figueroa's theory that unions are attracted to companies that have problems). At one point Figueroa even asks, "Do you want money?" Clearly Figueroa's repeated solicitations at this meeting were prompted strictly by the pres-

[6] Although Figueroa's version includes the reference to "problems," her approach is different from Santana's credited account.

[7] On cross-examination, Andrews refers to Figueroa's statement at the staff meeting that the Company had enough money to get rid of any employee regardless of the Union's presence.

[8] As with the protected speech in *Mediplex of Connecticut*, 319 NLRB 281 (1995).

ence of the Union. At no point does the Company seek to rebut the inference of an implied promise to remedy any grievances by showing a legitimate business reason for making the solicitations at this meeting, and on brief the Company makes no contention that it offered any rebuttal evidence. In these circumstances, I find that, as alleged in complaint paragraph 6(d), at this October 19 staff meeting the Company, by Human Resources Manager Figueroa "(implicitly) solicited employee complaints and grievances" with the implied promise of remedying the grievances if the employees would reject the Union.[9] By so doing, the Company violated Section 8(a)(1) of the Act. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

The final allegation concerning the October 19 staff meeting is that Human Resources Manager Figueroa "interrogated" the employees. On brief the Government points to the evidence that Figueroa, once Andrews mentioned the word "delegate," began asking the group, and Andrews, for the identity of the Union's "delegate." (This clearly was a search for the identity of the Union's in-office organizer.) Figueroa received no answer, Figueroa's general denial that she interrogated anyone was unpersuasive. Finding that Figueroa's interrogation, seeking the identity of the Union's in-office organizer, was coercive (as evidenced by the silence greeting her interrogation), I further find that, by such coercive interrogation, Company violated Section 8(a)(1) of the Act, as alleged.

4. Manager Figueroa interrogates Iris Andrews

a. Introduction

On brief the Government contends the allegations of complaint paragraphs 6(j), (k), and (l) are supported by the testimony of Iris Andrews. Paragraph 6(j) alleges a mid-October interrogation by Human Resources Manager Figueroa; 6(k) alleges that, about mid-October, the Company, by Figueroa, "created an impression among its employees that their concerted activities were under surveillance by Respondent"; and 6(l) alleges that the Company, by Figueroa, in mid-October, "asked employees to ascertain and disclose to Respondent the union membership, activities, and sympathies of other employees."

On brief the Company contends that there is no evidence to support paragraphs 6(k) and (l), and that they therefore should be dismissed. As to paragraph 6(k), there is brief evidence in support as I describe shortly. Respecting paragraph 6(l), the Government fails to point to any supporting evidence and articulates no theory of proof.[10] Accordingly, being in agreement with Company's contention, I shall dismiss complaint paragraph 6(l) on the basis of no supporting evidence.

As for the date of the incident, there is little direct evidence aside from the initial question directing Andrews' attention "to October 2000." However, on cross-examination Andrews states that the staff meeting occurred "before our private conversation." As Andrews is questioned about this incident and then about an incident on October 20, the implication is that this incident occurred the afternoon of October 19, following the staff meeting earlier that day. Although the matter is not entirely free from doubt, I find that this incident probably occurred the afternoon of October 19.

b. Facts

Iris Andrews testified that Human Resources Manager Figueroa called her into the conference room where, after Andrews shut the door and with just the two of them present, Figueroa "asked" for Andrews' opinion of the Union.[11] Andrews replied that she did not like all the mess. Figueroa responded that she had just returned from taking Marilyn Diaz to lunch. (On cross-examination, Santana confirms that Figueroa took Diaz to lunch after the staff meeting of October 19.) Figueroa said that she wanted to talk to Diaz because Diaz was engaging in conversation with Angie Santiago and tending to let Santiago persuade her to support the Union. During this conversation, Figueroa told Andrews that the Company once had paid an employee, who was vocal in promoting the Union, $10,000 "to shut his mouth." Figueroa said that the Company had money for that and much more.

Figueroa denies that any such private meeting with Andrews occurred, and generally denies interrogating employees or creating an impression among them that their concerted activities were under surveillance by the Company. Finding Andrews to be the more credible witness, both as to details and as to demeanor, I believe Iris Andrews and disbelieve Human Resources Manager Figueroa. In making this credibility resolution, I have again weighed the fact that Andrews agreed to lie in her October 20 affidavit in order to help District Manager Fresneda in his effort to weaken the Union. I also have considered whether Andrews' report could be the result of a resentment lingering from her own discharge. Again, however, I find Andrews to be a sincere witness, as well as a candid one.

c. Discussion

Having credited the account of Iris Andrews, I now find that the interrogation by Human Resources Manager Figueroa, an official from the Company's Caguas headquarters in the setting of a conference room and with her point-blank question asking for Andrews' opinion of the Union, reasonably would tend to be coercive. By Figueroa's question, therefore, the Company violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 6(j). I so find.

Furthermore, Figueroa's remark that Marilyn Diaz was talking with Santiago and was tending to let Santiago persuade her to support the Union, implies surveillance by the Company of the protected and concerted activities of its employees. *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106 fn. 2 (1997),

[9] The solicitation was explicit, not implicit. Although par. 6(d) should have alleged the vice of an implied promise to correct if the employees would reject the Union, there was no objection to this omission. Complaint par. 6(d), therefore, was amended by implied consent by virtue of the evidence elicited at trial without objection. Rule 15(b), Fed.R.Civ.P.

[10] In keeping with a lawyer's duty of candor to the court, the Government always should move to withdraw from its complaints any allegation for which there clearly is no supporting evidence.

[11] In a quirk that appears to creep into even the interpretation, "ask" frequently, as here, is rendered "told." As the context makes clear, Figueroa asked.

enfd. mem. as to all but an unrelated point 188 F.3d 508 (6th Cir. 1999). I find the Company therefore, violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 6(k).

5. Was Iris Andrews' affidavit of October 20, 2000 coerced?

a. Introduction

The topic here is covered by the two remaining allegations—paragraphs 6(h) and (i). Although both allegations cite "about mid-October 2000," the evidence points, without objection, to the specific date of October 20. As thus amended by operation of law, based on implied consent, paragraph 6(h) alleges that about October 20 the Company, by District Manager Fresneda, "interrogated its employees about other employees' union activities." Paragraph 6(i) alleges that about October 20 the Company, by Fresneda, "coerced its employees into providing a statement in order to discriminate against another employee for having engaged in union activities." As noted earlier, the Company denies.

There is no dispute that on October 20, Iris Andrews signed an affidavit taken by one of the Company's attorneys, witness Marta Villares. What is disputed is the nature of the conversation leading to Andrews' signing of the sworn statement. A copy of the one-page affidavit is in evidence, with the relevant portion reading as follows:

> 2. That on October 16, 2000, from 2:00 p.m. to 2:30 p.m., Angie Santiago approached me and asked me what was my opinion about the Union and she commented that they were considering to bring the Union to the Company.
>
> 3. This took place during my work hours, while I was asking if I could receive a facsimile on the machine downstairs.
>
> 4. On October 18, 2000, Angie Santiago approached me again and told me that they were organizing a meeting to inform the employees about the Union and that the same would be held on Saturday, October 28, 2000. She pointed out to me that they were going to have a Union representative there.
>
> 5. This occurred during my work hours.
>
> 6. That all the above stated is the truth and nothing else but the truth.
>
> AND FOR THE RECORD, I swear under oath the present statement.

b. Facts

In the afternoon of the same date that Andrews' affidavit was taken, District Manager Fresneda testified, Andrews came to his office and inquired whether someone was authorized to speak to her regarding the Union during working hours. Fresneda told her no, that no one has the right to interrupt the Company's operations. Andrews then related that about 2 p.m. Angie Santiago had approached her to give her some general information regarding the Union. Fresneda said that was a violation because Santiago was interrupting the Company's operation. Fresneda asked whether Andrews would sign a statement on this, and Andrews said yes. Fresneda then called the Company's attorneys, and the attorney (Marta Villares) arrived that afternoon and proceeded to take the affidavit of Andrews. The statement was given voluntarily by Andrews. Fresneda denies coercing Andrews to give the statement. The purpose for the statement, Fresneda asserts, basically was to record the event. No action was taken based on the affidavit.

Fresneda concedes that Andrews is the first employee he ever requested to give an affidavit. The reason for his request is that "they" were obstructing operations, and given that fact, Santiago's purpose in obstructing was immaterial as interruptions are not allowed for any purpose. Fresneda admits that he has never requested employees to give affidavits when they talk at work about subjects other than work. The Andrews' affidavit is the only one of that kind. Fresneda acknowledges that he remained present while Villares took Andrews' affidavit because Villares asked Andrews whether she would feel uncomfortable if Fresneda remained and Andrews said no that Fresneda could stay. Fresneda asserts that the occasion of Andrews' affidavit is the only incident that ever merited a sworn statement.

An attorney with the same law firm representing the Company here, Villares testified that she typed what Andrews related, and that Andrews had Villares make a change in the date of the "meeting" (the union meeting, apparently). Villares asked whether Andrews would have any trouble signing. Apparently saying no, Andrews signed.

Andrews' account is a bit different. She asserts that Fresneda called her into his office and asked whether Angie Santiago had talked to her about the Union. Andrews said yes, that it was during lunch. Fresneda said no, she was wrong, that it was at 2 p.m. that they had talked about the Union. Fresneda said he wanted Andrews to sign a sworn statement testifying that Santiago had talked to her about the Union during working hours.

At trial Andrews explains that, on the day of the conversation with Santiago, Andrews had experienced a problem with her supervisor, Milisha Gonzalez. Thereafter, when Andrews went to Santiago's office to send a fax, Andrews mentioned the problem with Supervisor Gonzalez, and commented that she was going to resign because she did not like what was going on at the Company. "Don't resign, hang in there," Santiago urged, adding "We're trying to bring in the Union. But tomorrow at lunchtime we'll talk some more." It was the next day at lunch that she and Santiago actually talked about the Union.

To Fresneda's declaration that he wanted her to sign a statement, Andrews asked whether that was necessary. Fresneda said that it was in order to weaken the Union's position. To her inquiry whether such would hurt Santiago, Fresneda promised that it would not affect Santiago's job or anyone else, that the only purpose was to weaken the Union's position. Besides, Fresneda added, the statement would remain confidential among the two of them and the attorneys.[12] Andrews left Fresneda's office and returned to work. About 45 minutes later she was called back to give the statement when the attorney arrived.

Andrews asserts that her affidavit is only partly true. At 2 p.m. (presumably on the first date given in the affidavit, that of

[12] The confidentiality was broken, Andrews asserts, for the next day employee Sylvia Lopez told Andrews she had learned of the statement that Andrews had given against Santiago.

October 16 at item number 2), Santiago only mentioned the Union, and it was the next day at lunch that they talked about it. As Andrews testified:

> I gave this sworn statement. It was rather to help Manolo. I didn't want to do it. I felt obliged but since we had a very special relationship with Manolo and I appreciate him a lot I wanted to help him, because I wasn't in favor of the Union.

On cross-examination, Andrews concedes that she read the statement before signing, including item 6 (about the "truth and nothing else but the truth"). Even so, Andrews testified, she had told Fresneda that the Union was only mentioned at 2 p.m., and that the discussion occurred (later) at lunch.[13] Then in a series of questions and answers, summarized earlier, Andrews reports that she understands that she did wrong by signing the statement, but that she was upset. She did what Fresneda wanted because she wanted to help him and because at the time she was not in favor of a union. Admitting that she agreed to lie for Fresneda, Andrews asserts that she was willing to do whatever Fresneda wanted because of the affection she felt for him. In part she was lying because at 2 p.m. the Union was only mentioned (not discussed). "At that moment I wasn't really lying. I was actually helping Manolo so the Union would lose strength and weaken and that's what he wanted."

Andrews concedes that she was very hurt, and surprised that Fresneda would be so hypocritical and would "stab me in the back as he did." She denies that her testimony is a lie against Fresneda, stating that she still feels an affection for him, that she is not angry with him, but pities him because "he's in this mess right now for following somebody that he should not follow."

By her three-page letter of November 8 to a company official in Florida, Andrews urged that he investigate the operation at the Humacao district because of numerous "irregularities and violations of employee rights." Her report in the letter of the affidavit incident, as well as the earlier request that Andrews spy, are consistent with her testimony at trial.

c. Discussion

Unlike in previous situations, here I am not persuaded by the testimony of Iris Andrews respecting the incident of the affidavit. Because I have credited her respecting the request by District Manager Fresneda that Andrews spy for him, I here find it very probable that what occurred is just what Fresneda asserts—that Andrews came and reported a conversation with Angie Santiago about the Union. Indeed, during her own testimony, Santiago did not deny it. Accordingly, I shall dismiss the interrogation allegation, complaint paragraph 6(h).

Respecting the coerced-affidavit allegation, complaint paragraph 6(i), I likewise find no merit. At no point does Iris Andrews assert that she felt pressured to give the sworn statement because District Manager Fresneda mentioned something about her job security. Indeed, Andrews makes it very clear that the only pressure she felt came from her own maternal affection for Fresneda and from her desire to help him regarding whatever he wanted to do. Thus, she readily agreed to give a sworn statement, and she did so voluntarily. I so find.

On brief the Government attacks a variety of unalleged concepts, ranging from no affidavits requested on other topics to no assurances given that there would be no reprisals. It is questionable whether the record evidence, which generally lacks positive evidence of the foregoing, would support the inferences that would have to be drawn in favor of the Government's arguments. But aside from all those problems, the complaint allegation is that the Company coerced Andrews. Finding no such coercion, I shall dismiss complaint paragraph 6(i).

D. The Discrimination Allegation

1. Knowledge

The Company admits the parts of complaint paragraph 7 that allege it discharged Blanca Santana about October 26 and that it has failed and refused to reinstate her. The Company denies the part that alleges the motivation for Santana's discharge to have been her activities on behalf of the Union.

Santana's only activities on behalf of the Union consist of her taking smoke breaks with Angie Santiago, the Union's in-plant organizer and the person who had served as the Union's observer at the previous election, and indicating to Santiago and to Iris Andrews that she intended to vote for the Union in the upcoming election. As noted earlier, Santana never signed a union authorization card. Santana also testified that management never asked her about her union preferences. On brief, the Company cites item 11 of its statement of facts (SOF), that subsequent to Santana's discharge, her husband, Dennis Labao, sent an email to, apparently, the Company's corporate office, the afternoon of Santana's discharge. Labao's email is an attachment to the Company's December 18 position letter. In item 11 of its SOF, the Company not only cites Labao's assertion that the Company never asked Santana whether she was for or against the Union (a fact Santana acknowledges at trial), but claims that Labao, in his email, asserts that the Company never "knew" Santana's preference about the election. As Labao makes no such statement in his email,[14] I need not address whether I would give any weight to such a statement, by a nonparty here, about what knowledge the Company possessed.

Of course, with a unit of only 12 employees at this small office in Humacao, it can be inferred that the Company's management was aware of at least the smoke break socializing. Thus, while the normal work interaction by Santana and Santiago inside the office might be presumed to be strictly business, the outside smoke break socializing could well cause alarm for any management concerned about the outcome of the pending election. As for the information given to Andrews, who had agreed to spy for District Manager Fresneda, I infer from the record evidence that Andrews, yielding to the strong maternal affection for Fresneda that she confessed at trial, reported this information to Fresneda because of her felt loyalty to him, over any consideration of confidentiality she might otherwise have maintained for the disclosure from her friend Santana.

[13] During her own testimony as a Government witness, Santiago was not asked about this matter.

[14] Such a misstatement of the record does not inspire confidence in the balance of counsel's brief.

The Government argues that knowledge can be inferred, in part, from the specific focus that Human Resources Manager Figueroa accorded both Santana and Santiago at the October 19 staff meeting. Countering, the Company points out that it was at the staff meeting that Santana openly declared satisfaction with her job and pay and stated that she had no problems. From Santana's public declaration, it is argued, it would be impossible to infer that the Company would suspect Santana of being a union supporter. The Company's argument is certainly one possibility, but it has to be weighed against what the Company, as I infer, was seeing (socializing with Santiago) and hearing from Andrews (that Santana intended to vote for the Union). Indeed, at lunch even after the October 19 staff meeting, Santana asked Andrews whether she had told anyone about her intention to vote for the Union.

Tellingly, Andrews did not answer that question, but instead reported that Fresneda had asked her to persuade Santana to vote no. I infer from Andrews' shift of the focus from the question asked to what Fresneda had asked her to do to be a tacit admission that she had reported to Fresneda about Santana's intention to vote for the Union. Hence, when Fresneda asked Andrews to persuade Santana to vote against the Union, Fresneda was not speaking of Andrews as someone considered neutral on the issue. Fresneda already knew from Andrews of Santana's prounion intent. Fresneda was asking Andrews to work on Santana and persuade her to change her mind and to vote no. In so finding, I further find that in the days leading up to Santana's October 26 discharge, the Company considered Blanca Santana as someone who intended to vote for the Union.

2. Timing

Timing is always a relevant factor to consider. Here, Santana's October 26 discharge falls between the October 13 election petition and the November 21 election. If the Company considered Santana either as a yes vote for the Union (or even as a likely vote for the Union), and if the Company were of a mind to terminate Santana's employment before the November 21 election, then the Company needed an incident. On brief, the Government argues two main points. First, the Government contends that the Company seized on, and distorted, an emergency absence on October 23 when Santana, after giving notice to the Company, had to take her 1-year old son to a hospital. The Company used the October 23 absence, plus two earlier excused absences, as a pretextual basis for discharge. Second, in order to generate a pressing need to act quickly in order to beat the election date of November 21, the Company discarded Santana's 3-month probationary period (sometimes erroneously referred to as 90 days), ending on December 11, as reflected on her hiring record, and instead elected to apply a 45-day probationary period, assertedly applicable under Puerto Rico law, because of Santana's earlier service as a temporary employee for the Company.

For its part, the Company contends that its attendance concern was valid, that Santana never gave proper notice on October 23, never brought a medical excuse thereafter, and that as Puerto Rico law would impose a 45-day probationary period, the Company had to act immediately or Santana would become a permanent employee of the Company. While that would have no significance under the Act, it may have under local law. Indeed, usually, local laws dealing with such employment matters as probationary periods or permanent employee status are irrelevant under the Act. The protections of the Act apply to statutory employees regardless of whether the employer classifies them as probationary or permanent. The Company is well aware of this and so states on page 2 of its December 18 position letter to NLRB Region 24. (The letter is part of the joint exhibits.) Respecting that letter, I treat it and all the exhibits received in evidence as documents issued. Thus, aside from a possible admission by a party in a document, I do not consider the internal statements beyond the fact that they were made. That is, I do not consider the internal statements for the truth of the matter asserted.

From the nature of the evidence, it appears the Company impliedly contends Puerto Rico "Law 80" of May 30, 1976, as amended (an apparent full citation is given as P.R. Laws Anot. t. 29, § 185h), is relevant because such is what it relied on. Of course, the Company is entitled to offer evidence of whatever factor it relied on, whether that factor is a local law or a local custom. The key point is that it must offer evidence of that factor. It cannot simply purport to describe that factor on brief. Unfortunately, no copy of Law 80 is in evidence. If the parties had stipulated to the authenticity of a copy of Law 80, and offered the copy into evidence, I would have received the stipulation, taken official notice of such statute, and received the copy into evidence. However, no such stipulation was made and no copy of the local law was offered.

The Government appears to argue that even if such is the local law, the Company waived its right to set a 45-day probationary term in the hiring and payroll paper when it wrote, "90-day probation period ends 12/11/00."[15] And even if the 45-day rule applied, the Government argues, the Company forfeited any right to claim it by waiting until day 46 to terminate Santana. Countering, the Company contends that the 45-day rule extends into day 46 so long as the employee is terminated on day 46 before she performs any work. Such a refinement would be highly relevant to this issue, particularly to the Company, because Santana's dismissal came the morning of her 46th day—before she began work for the day.

At one point on cross-examination District Manager Fresneda testified:

> Q. But it [he] has to be discharged on the 45th, correct?
>
> A. Well, if he doesn't start working on the 46th day I would say no.

A moment later a certain ambiguity is added when the term "period" is used. Thus:

> Q. Okay. Yes or no. If it's on a 45th day period the person has to be discharged when the 45-day period ends, correct?
>
> A. Yes.

[15] The employee handbook provides for a probationary period of 3 months. Moreover, December 11 is 91 days from September 11.

There was no redirect examination as to what Fresneda understands by the term "period." I find that, in line with his first response quoted that Fresneda understands that the "period" of the 45-day rule extends into day 46 so long as the employee is terminated before, as here, she does any work. Thus, by this testimony on cross-examination Fresneda adds, to the testimony of Human Resources Manager Figueroa, the refinement that the Company advances on brief to support its contention that Santana was terminated before she became a permanent employee. Against that contention there must be considered the Government's argument that the Company waived its right to have a 45-day rule apply when it opted to set the probationary period on the hiring and payroll document as ending December 11.

On brief the Company also asserts, in item 4 of its SOF that Santana and two other temporary employees hired as regular employees on September 11 each signed "a probationary employment agreement." But the exhibit cited in support is the payroll-hiring document that sets the probationary period as ending December 11. If the Company meant to refer to a separate document, then no such document is in evidence. The Company also states in item 6 of its SOF, citing a page number containing testimony by Human Resources Manager Figueroa, that it has a policy requiring every employee to sign such a probationary employment agreement when she begins working. While Figueroa does testify respecting the Company's policy for its probationary employees, as I describe above, she gives no testimony about employees having to sign "a probationary employment agreement." The Company's written probationary policy, a part of the excerpts from the "Associate's Manual" (employee handbook) that is part of the Joint Exhibits in evidence, does not mention any "probationary employment agreement."

The written policy of the Company sets a probationary term at 3 consecutive months of service. Human Resources Manager Figueroa testified that such provision recently was changed by the local law (presumably an amendment to Law 80), which states that an employee who "has been part of a temporary service company, the probationary period will be 45 days." While I do not treat Figueroa's statement as expert testimony on Puerto Rico law, I do treat it as a part of the Company's understanding of Puerto Rico law and how it should apply, or has the option of applying, the 45-day rule. The problem is that the evidence fails to clarify whether the Company understands that the new local law imposes the 45-day rule with no option to exercise a 3-month period. More in point, does the Company understand that the new local law must be applied retroactively to employees already in a probationary period of 3 months? For that matter, just when did amended Law No. 80 become effective? Was it before or after Santana entered her otherwise 3-month probationary period. The status of the record is such that there simply are too many critical questions left unanswered. Accordingly, I make no further effort to resolve just what understanding the Company did have of the amended Law 80, or even whether the Company waived whatever understanding it had (since the waiver question requires evidence of just when the asserted amendment to Law 80 became effective).

The bottom line on the timing matter, as it pertains to the question of a probationary period, is that I simply take the record as it is. That is, the Company terminated Santana on the asserted basis that she did not "approve" her probationary period. (The term "approve," not specifically defined in the record, appears to be a local idiomatic synonym for "complete," and on occasion a witness states that Santana did not successfully complete her probationary period. Current idiomatic use of the term possibly is the reverse of an original meaning that the employer must "approve" the probationary employee's performance in order for the employee to be elevated to permanent status.) While either party was free to produce evidence as to Puerto Rico Law No. 80, it appears that the Company is the party having the clearest need to show, as part of its rebuttal of the Government's evidence, that the December 11 ending of Santana's 3-month probationary period had been abbreviated to 45 days by operation of law when Puerto Rico Law 80 was amended on a certain effective date. As I have found, the combined testimony of Human Resources Manager Figueroa and District Manager Fresneda falls short of doing this because, as I describe above, it leaves too many unanswered questions. In short, the record supports a finding, which I now make, that the Company prematurely shortened Santana's probationary period from 3 months to 45 days. As to the Company's purpose in doing so, I discuss that later when I reach the issue of motivation.

3. Santana's attendance

Respecting her attendance, Blanca Santana was absent, and not paid, on two occasions, and left early once. One of the absences was in September and the other two incidents came in October. The first two of the three were approved in advance by management.

In September Santana missed 4 hours the afternoon of September 25 to attend a meeting for parents and teachers at the school of one of her sons. In October, Santana had a preapproved absence the full day, unpaid, of October 16 because of an "admission test." The record does not disclose whether the test was for one of her children or for herself. On Monday, October 23, Santana's year-old son became ill and she had to take him to the hospital's emergency room. At 7:30 a.m., before she left for the hospital, Santana called the office. Speaking with Jose Orlando Hernandez, who apparently answered the telephone, she asked for Milisha Gonzalez, her supervisor. (Hernandez discloses that he has a double first name of Jose Orlando.) Gonzalez does not arrive until 8 a.m. or later, Santana testified, and she apparently was not there. Santana proceeded to report her situation to Hernandez, a group leader for the service section, and told him that if she left the emergency room early she would report for work. She did not tell Hernandez that she would arrive for work that day, nor did she say that she would be absent all day. She did not call in again, nor did she report for work later that day.

At work the following morning, October 24, Santana informed Staff Accountant Gonzalez that she had been absent the previous day in order to take her very ill son to the emergency room. Gonzalez replied that there was "no problem," that "everything was fine." Santana told Gonzalez that she had evidence

of the hospital visit if Gonzalez wanted it, but Gonzalez said no, that there was "no problem with" Santana. Apparently contradicting (by implication, but not directly) that testimony, Gonzalez claims that she did ask Santana for an "excuse" (presumably written evidence) but that none was given. Indeed, on October 25 Gonzalez called Santana into her office and gave her a cautionary "guideline" memo from Jose Rodriguez, the District Controller, asserting that on October 23 she had left a message with Jose Orlando, "in charge of the dispatch area," that she would be reporting for work later in the day, but that she had failed to do so. The balance of the memo addresses the Company's need for information or any absences or tardiness so that the enterprise can function properly. Should she have questions, Santana is alerted to call Rodriguez. (The record fails to make clear whether, under Company policy, such a "guideline" is considered a disciplinary action and, therefore, an adverse employment action. In any event, the complaint does not attack the "guideline" memo as being an unfair labor practice under the Act.)

When Santana tells Gonzalez that she would not sign because she had followed the correct procedure, Gonzalez threatened to call in a third person to sign for her. Santana then went to her office and called Rodriguez who asked whether Santana had read the employee handbook. Santana was so upset that she did not reply. She signed the memo. Later that October 25 Gonzalez distributed a memo addressed, apparently, to all of her staff from District Controller Rodriguez advising them to contact Gonzalez in advance of any absences or late arrivals. Should Gonzalez not be available, they are to contact Fresneda or Rodriguez.

Company's employee handbook contains these relevant provisions (emphasis added):

> 1. In case of sickness or tardiness or any other *emergency* justifying the absence, it is essential that the associate notify its immediate supervisor or management (at the office), 24 hours prior to, or at the latest, *half hour* before the scheduled work time on the same day of the absence or tardiness.
>
> 2. The associate should notify the reason for the absence or tardiness and inform when he or she will return to work. Asking another associate, or a friend, or family member to notify the absence or tardiness is considered inappropriate, *unless it is an emergency*.
>
> 3. In case an associate is absent for *two (2) or more days* [he or she] will have to show a medical certificate certifying that the associate was ill during the time of absence.

From these provisions we see that, as this was an emergency situation, Santana properly called the office at least 30 minutes before her scheduled starting time of 8 a.m. She could not talk with her supervisor because Gonzalez was not present at that early time. Hernandez apparently was a proper person to notify, for the October 24 "guideline" memo from District Controller Rodriguez does not complain that Hernandez was not a proper person to have left the message with. And crediting Santana, as I do, we know that the morning of October 24 Staff Accountant Gonzalez told Santana that everything was fine and that she did not need any written evidence that she was at the hospital with her year-old son the previous day. I do not believe Gonzalez' contrary testimony.

The foregoing review reflects not only that Santana followed the procedure spelled out in the Company's employee handbook, but it also shows that Staff Accountant Gonzalez initially told Santana that everything was fine and that she need not furnish any certifying evidence. (Of course, as we saw above in the quotes from the employee handbook, no certifying evidence is due anyhow where the absence is for less than 2 days.)

4. Claimed disparity favoring Jessica Alejandro

Additionally, on brief the Government argues disparity based on the evidence pertaining to Jessica Alejandro. (Recall from Angie Santiago's testimony that Alejandro took over Santana's position as the accounts payable clerk some 2 days after Santana was fired.) Like Santana, Alejandro, who was working as a temporary employee for the Company, was hired as a regular employee on September 11 under Staff Accountant Gonzalez. Alejandro's hours, as Santana's, were 8 a.m. to 5 p.m.

Although copies of Alejandro's timecards were not offered into evidence, the timecards are described generally by District Manager Fresneda during the Government's cross-examination. Based on Fresneda's asserted testimony, on brief the Government contends that absences are shown for Alejandro as follows: for the week of September 18 through 24, 2 days; the week of September 25 through October 1, 4.5 days, for a total of 6.5 days. Actually, it is difficult to follow the testimony because counsel and the witness were looking at, and addressing, copies of documents that are not in evidence. Indeed, the half-day absence appears to have been on September 11, and there is no testimony showing an absence of 2 days for the week of September 18. Moreover, Fresneda testified that Alejandro worked on service contracts during the weeks of September 18 and September 24 at the Caguas headquarters. That may have carried over into the week of October 2. The date of October 2 is the only one with the word "Caguas" written in.

Unfortunately, the record simply is confusing. At the beginning of this topic on cross-examination, Government counsel announced that she was marking a document containing copies of the timecards of Alejandro and others as "General Counsel's Exhibit No. 18." Neither that document, nor an exhibit consisting of the extracted copies of Alejandro's timecards, ever was offered in evidence. This is so even though, toward the end of all this, I voiced an implied suggestion: "There are some things you can learn from the documents themselves."

On brief the Government argues that District Manager Fresneda should not be credited respecting his testimony that Jessica Alejandro worked at the Caguas headquarters for the weeks in question. Where a party contends that an employee did not work at all during 1 or more weeks, and the timecards themselves are disputed, the natural choice would be to call for the payroll documents. They might show, for example, that an hourly paid employee (such as Alejandro) was not paid for the time in question. Apparently no payroll documents were subpoenaed or otherwise requested.

The Government also points to Fresneda's testimony that, as Blanca Santana's timecard for October 16 did not appear to be

clocked in, he had to assume that the absence was excused. From this the Government argues that the absence of a time clock punch must be assumed to be an excused absence unless it is otherwise stated on the card itself. "Therefore, it can only be concluded that" the Company's own records respecting Alejandro show that Santana was fired on a pretext. The Government seeks to build a bridge too far. The point possibly would serve as minor supplemental support for solid evidence showing disparity. But this point has no solid evidence to lean on for its own support.

Recall that Jessica Alejandro was called as a witness during the Company's case-in-defense. During her testimony, Alejandro was not asked about her timecards, her attendance, or whether she had worked several days during September–October at the Caguas headquarters. However, I draw no inference from this because District Manager Fresneda, who testified as the Company's last witness during the unfair labor practice portion of the trial (and Fresneda was the testifying witness concerning Alejandro's timecards),[16] was not questioned about Alejandro's timecards until the Government's cross-examination.

As part of its effort to show discrimination, the Government seeks to show disparity of treatment. Thus, the Government has the burden of persuasion on the issue. I need not credit District Manager Fresneda in order to find, as I do, that the Government's evidence fails to show a disparity of treatment favoring Jessica Alejandro and disfavoring Blanca Santana on the question of attendance. (Indeed, with no copies of Alejandro's timecards in evidence, I am substantially handicapped in any attempt to evaluate the credibility of Fresneda's testimony respecting those timecards, and I am unable to verify the Government's contentions regarding the cards.) The record evidence simply fails to persuade that, from September 11 to October 26, Jessica Alejandro was absent at least as much as, and perhaps more than, Blanca Santana's 2.5 days of absences. In fact, over that time span Alejandro may or may not have been absent 2.5 days or more. All I find here is that the record evidence is insufficient to show that Alejandro in fact was absent as much or more than was Blanca Santana during the weeks in issue. It is on that basis that I find no merit to the Government's disparity contention.

5. Blanca Santana discharged

a. The discharge meeting

At 7:30 the morning of October 26 when Santana arrived for work, she observed the unusual fact that District Controller Rodriguez was seated in District Manager Fresneda's office. She suspected that Rodriguez' presence was related to his memo to her and her call to him. As she proceeded to the timeclock to check the time, she met Jose Orlando Hernandez. Santana told Hernandez that she had a bad feeling about the situation. Hernandez assured Santana that she could rely on him. Not yet punching her timecard, Santana was proceeding toward her office when Rodriguez called her over. She said that she had not yet punched in. Rodriguez said that was not a problem. As Santana sat down, Rodriguez called in "Mr. Negron."[17] Rodriguez then handed a letter to Santana. As Santana finished reading the two-sentence letter—a letter of discharge—Rodriguez informed her that the Company would no longer need her services.

The relevant text of the letter, dated October 26, and signed by Rodriguez, reads:

> By this means we wish to notify you that we have decided to terminate your services, effective today, October 26, 2000, for not having completed satisfactorily your probationary period.

Santana then asked Rodriguez why she was being dismissed because she had done a good job and had been very responsible in her work. [Indeed, on one occasion after they had become probationary employees on September 11, Santana and Iris Andrews were praised by Staff Accountant Gonzalez for their good work. On that occasion, Gonzalez compared Andrews to a "monster" and told Santana that she was like an "octopus"—names suggesting that they could handle many tasks at once and conquer even the most vexing problems.] Apparently either without waiting for an answer from Rodriguez, or without receiving one, Santana continued her statement, saying that when she completed her own assignments she helped her fellow workers.

Because Rodriguez was never in the Humacao office, Santana turned to Operations Manager Negron and pleaded to him that he knew very well that at work she had been highly responsible and very devoted, working overtime as needed, and even coming in on Saturdays. Speaking directly to Negron, Santana said, "You know how well I work." Negron remained silent, uttering not a word. At that, Santana told Rodriguez that working there had been a pleasure, and she rose and went to her office to call her brother for a ride.

b. Conversation by lawyer's office

As Santana was calling her brother, she heard Iris Andrews say that her timecard was not at the timeclock, and she then heard Rodriguez call Andrews over. As the Company acknowledges on brief, and as Andrews testified, Andrews also was terminated that morning, and for the same stated reason as Santana. Or as Fresneda idiomatically puts it concerning Andrews, "She did not approve her probationary period satisfactorily."

Andrews accepted a ride with Santana, and they decided to go to the "Standards and Salaries" office. (The record does not tell us, but perhaps the office handles claims for unemployment compensation.) Dropping the two women near that Government office, Santana's brother left. The office is in an area known as the "Judicial Center," and many attorneys have offices in the area. Indeed, as Santana and Andrews started walking, they met District Manager Fresneda by the office of a law firm. (Fresneda recalls that they met in the firm's parking lot.) The testimony of Santana, supported by that of Andrews, re-

[16] Earlier, when the Government counsel was cross-examining Human Resources Manager Figueroa, Figueroa testified that she did not know how many absences Alejandro had. But Figueroa was not presented with copies of Alejandro's timecards and questioned about them.

[17] Apparently Operations Manager Jesus Negron, as Hernandez, Santiago, and Fresneda identify him during the part of the trial pertaining to the election case.

flects that the women asked Fresneda for the reason that they had been fired. Fresneda replied that he knew the reason "but I cannot talk about it" because he was on the Company's side and he knew that they were going to proceed legally against the Company. The only material difference in Fresneda's version is the absence of a statement that he knew the reason but could not give it. According to Fresneda, he simply told them that a decision had been made and that was the resolution of the matter.

Santana and Andrews testified in more detail and with a more favorable demeanor than did District Manager Fresneda, and I therefore credit their collective account over Fresneda's version. The Government does not advance its contention as to the significance of the credited account. To the extent the Government impliedly contends that Fresneda's response to the women suggests an acknowledgment that a secret reason underlying the decision to discharge, and different from the one of absenteeism not told to Santana at her discharge. This implied contention would call for me to speculate, for it is possible that Fresneda did not want to get into a discussion with, for example, Santana about the selected ground of absenteeism before everyone appeared at an unemployment hearing or even at a potential unfair labor practice trial over her discharge. I therefore assign no weight to Fresneda's response.

c. Reason given for Santana's discharge

District Manager Fresneda testified that he and District Controller Rodriguez made the decision to discharge Blanca Santana. As Fresneda recalls, they were in the Caguas office of Rodriguez, and the date was that of Santana's third absence (October 23). Although they looked at Santana's records, they did not compare her records, such as attendance, with other employees. They based their decision on Santana's number of absences. (Earlier, Human Resources Manager Figueroa testified that, although she did not participate in the decision, and was merely informed of it, she knew the reasons—absenteeism and tardiness. Santana was 2 minutes late on Monday, September 25, but Fresneda testified, on redirect examination, that he does not consider an employee as late unless her tardiness exceeds "10–15 minutes." That leaves only one arrival that Fresneda would consider just a bit tardy, one day in the second week of October when she arrived at 8:17 a.m.)

District Controller Rodriguez did not testify, and Figueroa admits that she was not involved in the decision to discharge Santana and that she made no recommendation. On brief, and citing Fresneda's testimony, the Company lists absenteeism as the only reason for Santana's discharge. Yet in the Company's December 18 position letter, the Company asserts that the reason was twofold: "she had demonstrated a pattern of not arriving on time to work in the mornings," and "Even more, a couple of days before her dismissal, she left a message at the company informing that she was going to be arriving late. However, she never showed up. Thus, she was given a written reprimand by her supervisor."

Because Fresneda is the only decision maker who was a witness, I consider only Fresneda's testimony as to the basis for the discharge. (At the same time, I shall consider the shifting reasons when I reach the discussion section.) Thus, I find that the only reason the Company relied on as the basis for Santana's discharge was Blanca Santana's absenteeism of 2.5 days during her some 6.5 weeks as a regular, but probationary, employee of the Company. Of those 2.5 days, 1.5 days were approved absences (both Figueroa and Fresneda testified that approved absences are still absences), and as I have found, the third and last day of absence (October 23) was caused by a day long visit to the hospital emergency room with her 1-year old son.

6. Discussion

Knowledge I have found. Timing, too, at least partially, for I deferred discussion of the Company's motivation for cutting Santana's stated (personnel, payroll record) from 3 months to 45 days. As summarized earlier, I found that the Company failed to establish, as its burden on the issue, that local law (including the effective date) required such an abbreviation, and I have proceeded with the record evidence as it stands. I now find that the Company's motivation for abbreviating Santana's probationary period was, as argued by the Government, for the purpose of creating a pressing need to act quickly (compliance with the claimed 45-day rule) in order to rid itself of someone (Santana) viewed as a vote for the Union if she were still employed on election day, November 21.

As for any potential argument that the Company did not move against Angie Santiago, the Union's in-office organizer, it is enough to observe the traditional response that an otherwise unlawful discharge of one employee is not rendered proper simply because the employer refrains from discharging the most prominent supporter of the Union. Moreover, Santiago was a "permanent" employee and, apparently under local law, would be more difficult to terminate than would be a probationary employee. In any event, bypassing the most prominent union supporter while eliminating one or more probationary employees possibly could be a successful tactic in a voting unit as small as this one.

Consider now some of the factors that support a finding here of unlawful motivation. First, in converting Santana on September 11 from temporary to regular employee status, the Company thereby demonstrated its belief that Santana was a good worker with a reliable attendance record. (Santana's attendance record for her time as a temporary worker at the Company is not in evidence.) Human Resources Manager Figueroa testified that the Company wants to have good workers on its staff. In hiring Santana on September 11 as a regular employee, the Company increased her hourly pay rate from $5.15 to $7. As Fresneda concedes, during Santana's probationary period, the Company paid for Santana to be trained in Microsoft's Excel software program—a fact indicating confidence and approval of Santana as a regular, although probationary, employee.

And as previously noted, Staff Accountant Gonzalez complimented Santana as being like an "octopus" in her ability to process work. Confirming Santana's testimony, Staff Accountant Gonzalez acknowledges that she had never spoken to Santana about any attendance problem. Indeed, as Santana credibly testified, "Milisha [Supervisor Gonzalez] never said anything about tardiness or absences. On the contrary, she

always spoke highly of the way I performed at work." I note the absence of any evidence that the Company consulted with Staff Accountant Gonzalez before it terminated Santana.

Respecting the Company's shifting defenses, recall that, in its December 18 position letter to NLRB Region 24, the Company asserted two grounds for Santana's discharge. One is the absence of October 23 which, the Company claimed in the letter, came after a call that she would be late, and then she never came to work that day. The other is a claimed "pattern" of tardiness—clearly a false ground even by the Company's own records. As we have seen at trial the Company dropped the pattern of tardiness ground and relies solely on the ground of absenteeism. While that may have been understandable given the facts, I nevertheless draw an adverse inference from this shifting of reasons. The Board has long held that shifting reasons constitute evidence of discriminatory motivation. *U. S. Coachworks, Inc.*, 334 NLRB 955 (2001); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

Moreover, in shifting its grounds the Company puts itself in the position of having to denigrate its own approval of two of Santana's three absences as being, nevertheless, absences. Factually that is so, but from a credibility standpoint, such denigration by Human Resources Manager Figueroa and District Manager Fresneda had a hollow tone. Indeed, the hollow sound of their testimony reveals the emptiness of the Company's position when contrasted with the fact that Staff Accountant Gonzalez never even mentioned absenteeism to Santana before October 25 when she delivered District Controller Rodriguez' October 24 "guideline" memo to Santana. More than that, when, as I have found, Santana returned from her emergency absence of October 23, and asked Gonzalez whether she wanted to see evidence, Gonzalez gave Santana a ringing compliment—that Gonzalez had "no problem" with Santana.

The big change from that ringing compliment by Staff Accountant Gonzalez to the next day's delivery by Gonzalez of the "guideline" from District Controller Rodriguez graphically demonstrates that the Company either bypassed or overrode the supervisor's opinion in order to generate some paper foundation for a planned decision to get rid of Santana before the election date. I so find.

Finally, I find animus reflected in my earlier findings of coercive statements. Taken together, the coercive remarks reveal that the Company was so determined to keep the Union out that it would resort to threats, such as the loss of benefits, interrogation to ascertain the identity of union supporters, and even the solicitation of Iris Andrews to serve as a spy and to report the activities and identities of union supporters. The reflection of animus serves to disclose a corporate bent focused on eliminating the thorn that the Company believed that a union would present. To accomplish that goal meant that the Union would have to lose the November 21 election. To increase the odds against a union election victory meant that the Company needed to eliminate from the voting unit any probationary employee seen by management as likely to vote yes in the November 21 election. This brings us full circle to my finding that the Company selected the ground of absenteeism as a pretext to discharge Blanca Santana, and that a moving reason for her discharge was the Company's view that, unless terminated before the election, Santana would cast a yes vote for the Union on November 21.

Having found that the Government has established, prima facie, that the Company fired Blanca Santana because of its belief that Santana favored the Union and would vote for it at the election scheduled for November 21, I turn now to the Company's affirmative defense—that it would have fired Santana even had there been no union on the scene.[18] On this affirmative defense, the Company must persuade by a preponderance of the credible evidence. The fatal flaw in the Company's defense is that, as I have found, it seized on Santana's three absences as a pretext. Stated differently, absenteeism was not the real reason that the Company fired Blanca Santana. True, the record shows that the Company previously has terminated at least one employee (Irma Gonzalez) for not successfully completing her probationary period. But that proves nothing. The Government does not contest the Company's right to discharge a probationary employee—only its motive for selecting Blanca Santana for such a discharge.

On brief, and citing *Nuclear Support Services*, 313 NLRB 870, 874 (1994), the Government contends that, in a pretext discharge, the *Wright Line* analysis need not be applied. I disagree. Under my reading of Board law, the *Wright Line* analysis applies to all motivation cases, including those of pretext (false-reason cases), as well as dual-motive cases. *Casey Electric*, 313 NLRB 774 fn. 2 (1994). In that respect, *Nuclear Support Services* appears to be an inadvertent aberration from established Board law. See, for example, *Robert F. Kennedy Medical Center*, 332 NLRB 1536, 1538 fn. 5 (2000) ("the same standard applies in all cases turning on employer motivation"). Indeed, in a lengthy decision by the Board, in overturning a judge's dismissal of discrimination allegations in a pretext case, the Board specifically applied the *Wright Line* analysis. See *Naomi Knitting Plant*, 328 NLRB at 1281–1283.

Applying the *Wright Line* analysis here, I find that the Government has proved a discriminatory motive in the Company's discharge of Blanca Santana. The Company, however, has failed to carry its burden (a burden of persuasion) of establishing its affirmative defense (it could not do so given the falsity of the reason it advanced) that it would have discharged Santana even had there been no union in the picture. Accordingly, I find that when it discharged Blanca Santana on October 26, the Company violated Section 8(a)(3) and (1) of the Act, as alleged. I shall order the Company to offer Blanca Santana full reinstatement and to make her whole, with interest.

E. The Challenged Ballots

1. Introduction

Recall from my statement of the case at the beginning of this decision that the election vote was 4 to 3 in favor of the Union, but that, as of the trial, there are three challenged ballots to resolve in the election case, Case 24–RC–8138. These are the

[18] This is the analytical standard. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), as clarified by *Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276–278 (1994).

ballots of Blanca Santana, Keila Ramos, and Marilyn Diaz. Recall also that the trial was divided into two parts, with the first part being the unfair labor practice case (primarily the discharge of Blanca Santana), and the second part, having two stages, being the election case (primarily the challenged ballots of Keila, Ramos, and Marilyn Diaz). In the first stage of the election case, the Union sought to establish that the ballot of Keila Ramos should not be opened and counted because she either is a managerial or a supervisory employee. The second stage consisted of the Company's effort to show that the ballot of Marilyn Diaz should not be counted because she is a confidential employee. As already mentioned, the Union did not file a brief as to any portion of the overall case. Being a neutral party in the election case, the Government's only position on any of the challenged ballots is that, if merit is found to the unfair labor practice allegation as to Blanca Santana, then her ballot should be opened and counted. I take the three voters in that order here.

2. Blanca Santana

The first challenge, to the ballot of Blanca Santana, has been resolved by my decision in the unfair labor practice case. I therefore recommend to the Board that the challenge to Santana's ballot be rejected, and that her ballot be opened and counted.

3. Keila Ramos

a. Facts

As noted at the beginning, in this Ramos stage the Union called two witnesses and the Company called four. Those who testified for the Union were (former) Group Leader Jose Orlando Hernandez and Purchasing Agent Angie Santiago. Hernandez did not testify in the unfair labor practice part of the case, but Santiago did. The Company called Keila Ramos, Human Resources Manager Figueroa, Customer Service Manager (and Sales Manager) Mayra Maldonado, and District Manager Manuel Fresneda.

Santiago's very brief testimony is that (in her opinion) Keila Ramos is a supervisor because Santiago has heard her give orders to her coworkers, and has heard Operations Manager Jesus Negron tell the dispatchers that any changes to be made respecting containers, routes, or anything concerning the Company's customers must be approved by Ramos.

Before his October departure from the Company, Hernandez testified, he worked as a group leader in the customer service department overseeing the work of two dispatchers and handling the nonhazardous solid waste at the Humacao landfill. Among his group leader duties were preparing routes for the front-end loaders for the following day and, on instructions from the supervisor, Hernandez would prepare routes for the delivery of containers and the removal of containers. He also, as the administrator for the solidification area, issued certificates of disposal for the solid, nonhazardous waste. Hernandez asserts that his supervisor was Keila Ramos.

On a daily basis, Hernandez asserts, Ramos would give him contracts to deliver the containers, and instructions to remove containers. Ramos also instructed Hernandez to determine what specific driver had done a given service, and to ascertain whether the service had been completed. Although no one told Hernandez that Ramos was the supervisor, the employees there told Hernandez that they considered her such, and several times Hernandez observed Ramos slam her hand down saying that she was the boss there. (There is no evidence that Operations Manager Negron, or any manager, was present and failed to contradict such a claim.) None of the workers in the department questioned Ramos' claim to being the boss.

Keila Ramos states that she is a "customer service representative," and that her superiors are District Manager Fresneda and Customer Service Manager Maldonado. Ramos testified that, for example, she receives service calls, such as calls regarding poor service. Ramos then goes to the operations department (or whatever department is affected). Personnel in operations will analyze the problem, devise a solution, and tell Ramos how they are going to handle the matter. Occasionally the district manager will need to be consulted to approve the procedure. (Ramos processes a call to cancel service through the sales department.)

Ramos denies that she has any independent authority to make changes in prices, routes, containers, or to apply credits to accounts. (Nor can she independently "make a determination concerning the service of a customer," but that description is too vague as it would cover everything from establishing the service to resolving a minor complaint.) Ramos testified that she has never supervised anyone at the Company and has never recommended any disciplinary measures for an employee. (Testifying later, Customer Service Manager Mayra Maldonado and District Manager Fresneda confirmed this testimony.) Ramos describes Jose Orlando Hernandez as the operations department supervisor, and testified that she never supervised him, never disciplined him, and never recommended discipline as to him. District Manager Fresneda informs us that Hernandez was supervised by Operations Manager Jesus Negron.

Ramos identified a one-page document as, in effect, the job description for her position of customer service representative. The "Principal Duties & Responsibilities" section list these nine bullet-point items:

- Establish and maintain a high level of customer satisfaction, including meeting customer retention goals, resolving customer complaints, resolving accounts receivables and service issues.
- Meet assigned retention goals. Maintain contact with existing clients to effectively recognize and meet customer needs.
- Acquire an in-depth understanding of local, state and federal waste regulations and legislation.
- Analyze lost business trends and recommend corrective action.
- Effectively resolve (combined with the collection department) accounts receivable issues with customers.
- Follow-up on service problems of all types with operations department.
- Keep log of all customer calls, complaints and solutions.
- Generate Customer Service Representative weekly report. This includes:

1. All the customer retention forms completed by you including those from sales reps that have a problem to be resolved.

2. You should submit a complete log of incoming calls and the way they were handled.

3. Also include the cancellation request log with all the information completed.

Maintain contract files updated with the coordination of the filing clerk.

The bullet-point list is followed by the closing paragraph which opens by stating that the customer service representative will receive many phone calls, and that the representative should answer them in a "pleasant, informative and timely manner." Before a closing sentence about a "rewarding incentive program," a sentence in bold reads, "The emphasis of our customer service representative (CSR) is to establish a strong working relationship with our clients."

Ramos identified a noncompete agreement that she signed on October 19, but she explains that all employees who have access to pricing and to the account files (on computer, apparently) also sign such an agreement. Classified information, covered by the agreement, cannot be accessed by just anyone, but only by personnel who are so authorized and who work with the accounts, including managers and supervisors—and also including the bill collectors who, as members of the bargaining unit, voted in the election.

Human Resources Manager Figueroa testified that the purpose for the noncompete agreement is to cover all employees involved with customers, including managers, supervisors, customer service representatives, and sales representatives. Figueroa testified that the latter two categories are not classified as supervisors, but that they have access to the customer accounts. The agreement would prevent them from leaving the Company and going "directly to our competition with our price structure." Figueroa testified that Keila Ramos does not supervise anyone at the Company, nor has she ever recommended that anyone be disciplined, hired, promoted, or fired.

Customer Service Manager (and Sales Manager) Mayra Maldonado (who reports to the regional vice president over all of Puerto Rico) testified that the customer service department has five customer service representatives, one of whom is located at each district office. From her office in Caguas, Maldonado (along with each district manager) supervises the customer service representatives. Maldonado identifies Ramos as one of the five customer service representatives, and states that Ramos is assigned to Humacao. Ramos does not, Maldonado asserts, supervise anyone. Maldonado visits with the customer service representatives on site once or twice a month, and talks with each of them daily by telephone.

Maldonado confirms Figueroa's description of the purpose of the noncompete agreement. Her description of the job duties of Keila Ramos, as a customer service representative, essentially matches the items quoted above in the bullet-point list. Going further, Maldonado identifies several forms, received in evidence, that are described in the job description, including a customer retention record, a cancellation request form, a form listing calls coming in to customer service, and a form occasionally filled out by a customer service representative, or a sales representative, known as a "Credit/Debit Form." This latter form pertains to the age of a bill and whether an adjustment is to be made after the approval of the district manager and the controller. As the testimony and the forms themselves reflect, they are clerical in nature.

Testifying last for the Company at this stage, District Manager Fresneda confirms the essentials given by Human Resources Manager Figueroa and Customer Service Manager Maldonado concerning Ramos' lack of supervisory authority. He further confirms that Ramos is a "liaison between the customer and us, the Company." Ramos, Fresneda asserts, has no authority to give orders to anyone because "she has nobody that works under her."

b. Discussion

1. Managerial

Although not expressly excluded from coverage by the Act, "managerial" employees, not otherwise supervisory employees, long have been treated by the Board as implicitly excluded from such coverage. In 1974, the Supreme Court affirmed the Board's interpretation of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). In *Bell Aerospace*, the Court adopted the Board's definition that managerial employees are those "who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." See *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 576 (1994).

Respecting the question of managerial status, the party contending such (the Union here) carries the burden of persuasion on showing managerial status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001) (implicit in the Court's language that party asserting a statutory exception carries the burden of proving it); *Allstate Insurance Co.*, 332 NLRB 759 fn. 2 (2000). There is no evidence here that, during the relevant time, Keila Ramos exercised or recommended any "discretionary actions that effectively control or implement employer policy." *Allstate Insurance*, id. at 762, quoting from *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980).

I find that, unlike the "Purchasing/Inventory Controller" (Madrene Cupkie) who, exercising substantial unreviewed discretion in committing large amounts of the employer's credit, was held to be a managerial employee in *Concepts & Designs, Inc.*, 318 NLRB 948, 956–957 (1995), enfd. 101 F.3d 1243 (8th Cir. 1996), the duties and authority of Keila Ramos are more like the very limited discretion of the "Systems/Pagination Coordinator" (Bonnie Coats) found to be nonmanagerial in *Bakersfield Californian*, 316 NLRB 1211, 1214–1215 (1995). Finding that the Union has failed to carry its burden of establishing that Keila Ramos, during the relevant time, was a managerial employee, I therefore find no merit to the managerial ground of the Union's challenge to the ballot of Keila Ramos.

2. Supervisory

After May 29, 2001, there no longer is any question of the applicable rule on the burden of persuasion—the party arguing supervisory status carries that burden of proof on the issue. *NLRB v. Kentucky River Community Care*, supra (upholding the Board's longstanding allocation of the burden of proof on an exception or exemption from the Act's protection). To the extent that any of the evidence here even remotely suggests supervisory status, it falls far short of the Union's legal burden of proof.

What Jose Orlando Hernandez describes as orders from Keila Ramos appear to be nothing more than Ramos' efforts on one or both of two areas of her work. In one area she has to gather the information needed to fill out the various customer service forms that she is charged with completing. In the other area she coordinates with, for example, the operations department on service complaints. When personnel in operations devise a solution, they inform Ramos how they are going to handle the matter. Ramos, in turn, has to communicate with the customer (the client). In short, public relations and customer satisfaction are involved. To the extent that Operations Manager Negron has told dispatchers that any changes to be made respecting containers, routes, or anything concerning customers have to be approved by Ramos (as Angie Santiago describes), the evidence (which is not fully developed on this point) suggests that Negron simply was ensuring that Ramos could carry out her duty of establishing and maintaining "a strong relationship with" the Company's clients. In any event, there is no evidence that any such "orders" by Ramos consisted of an exercise of independent judgment.

As suggested from Hernandez' testimony, it may well be that Keila Ramos, seeking to capitalize personally on Operations Manager Negron's efforts to assist her in performing her liaison work with the Company's customers, has undertaken to exercise a certain amount of bluffing ("I am the boss here") of her coworkers as to the extent of her own status and authority. That bluffing conduct (there is no evidence that Operations Manager Negron was present and did not correct the assertion) no doubt has contributed to an opinion among her coworkers that she has been vested by management with supervisory authority. However, the fact that Ramos' coworkers view her as the "boss" is only a secondary indicium of statutory authority. Similarly, that Ramos signed a noncompete agreement does not serve to establish supervisory authority (or managerial status), for at best it would be only a secondary indicium and, in any event, others (bill collectors) who also signed one are members of the bargaining unit and voted. Secondary indicia alone will not confer supervisory status under the Act. To do that, there must be evidence of one or more of the primary indicia. *Adco Electric*, 307 NLRB 1113 fn. 1, 1120 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993). And there is no evidence here of any of the primary indicia.

Having found no merit to both grounds (managerial and supervisory) of the Union's challenge to the ballot of Keila Ramos, I now recommend to the Board that such challenge be overruled, and that the ballot of Keila Ramos be opened and counted.

4. Marilyn Diaz

a. Facts

As noted at the beginning, at the Diaz stage the Company called two witnesses (District Manager Fresneda and Human Resources Manager Figueroa) and the Union one (Marilyn Diaz).

Fresneda's rather brief testimony is that Marilyn Diaz is his secretary and has been for about 4 years. Part of that time, while Fresneda was the landfill manager, Fresneda and Douglas Whitehead, the district manager at the time, shared the secretarial services of Diaz. When Whitehead departed in May, Fresneda became the district manager. As of November, Fresneda testified, Diaz, as Fresneda's secretary, was responsible for (typing, presumably) any documents or letters that issue from Fresneda pertaining to his duties. When specifically asked at the beginning of his testimony in the unfair labor practice part of the trial to describe his duties and responsibilities as district manager, Fresneda testified:

> Basically, there are two operations there. One is the transportation company and the other one deals with sanitary fills. So, basically it's watching over the operation, in general.

Fresneda testified that Diaz also is the liaison with the human resources department in Caguas because she is the "custodian of the employee files at our facilities at Humacao." Diaz types and files any employee disciplinary memos in the employees personnel file, including those pertaining to the drivers in the bargaining unit that is represented by the Union. Fresneda asserts that the personnel files maintained at Humacao are "an exact copy" of the files, with the original documents, at the Caguas headquarters. Diaz also handles the payroll, and that includes the drivers who are covered under the collective-bargaining agreement with the Union. The payroll consumes a "considerable amount" of Diaz' time. Diaz maintains and files the personnel records related to sick leave, vacations, and insurance. When Diaz is not present, Staff Accountant Milisha Gonzalez will process any papers pertaining to personnel records and files, and Jessica Alejandro will do the data entry (for the payroll, apparently). The accounting supervisor, Milisha Gonzalez, has the keys to all the files. Fresneda asserts that he supervises Marilyn Diaz. (Gonzalez testified that she supervises Diaz respecting the payroll.)

Human Resources Manager Figueroa, whose office is located at the Caguas headquarters, testified that her department is structured so that two persons report directly to her. One person is responsible for the payroll. (The other presumably is in charge of the personnel, or human resources, function.) At each local site, such as at Humacao, a person serves as the liaison with Figueroa's office respecting the payroll and the personnel functions. At Humacao that person is Marilyn Diaz. Figueroa confirms that Diaz prepares all the payroll papers and reports, and did so in November. Figueroa confirms that Diaz calculates and prepares the figures and records respecting vacation and sick leave of employees.

Marilyn Diaz is "the person who keeps copies of all the files of the employees in Humacao." Diaz files all the papers in the personnel files, such as the application, salary changes for em-

ployees, and any disciplinary warnings. Diaz also handles employment verifications. Although Figueroa normally does that from her office, she has authorized Marilyn Diaz to do so, and to sign Figueroa's name, along with Marilyn Diaz' initials. An example of such an employment verification letter is in evidence. Dated December 15, it shows the employee's name, social security number, hours of work, pay rate, date of hire, and, for the employee named on the exhibit in evidence, that he is a permanent employee. For the exhibit in evidence, the record shows that Marilyn Diaz signed Figueroa's name, followed with Diaz' initials.

Another document identified by Figueroa is a one-page "Description of Daily Tasks." The copy in evidence, dated June 1, 2001, was filled out by Marilyn Diaz, and she listed 13 line items of work tasks that she performs during a given week with the time, in hours or half hours,[19] devoted to such tasks on a daily or weekly basis. (Some of the items, as Diaz also tells us, are of recent origin.) Although the form has been in use only since Jose Cardona, the new general manager, or regional vice president, took charge of the Company's Puerto Rico operations about June 2001, Figueroa asserts that the human resources part, including the payroll, was being done by Diaz in November. Of these duties, and based on the Diaz' description of her tasks in the exhibit in evidence, Figueroa states that the "confidential" portion would be the 2.5 hours per week that she devotes to maintaining the personnel files and absentee reports plus the unstated time that she devotes to issuing employment verification letters.

When the Company rested its case as to Marilyn Diaz' challenged ballot, the Union then called Diaz as a witness. Testifying that she was hired in April 1997, Diaz reports that her duties have always been that of "office clerk." Indeed, the "Description of Daily Tasks" form reflects that her position is that of "Office clerk." In her career at the Company, Diaz has done work for the two previous district managers, Ellsworth B. Mink and Douglas Whitehead. She worked directly for Mink, typing his memos, receiving his calls, and running errands. She had the key to Mink's office and the master keys for the files and the other offices. For Whitehead (who apparently succeeded Mink) she did similar work, such as preparing disciplinary memos to employees and also a tonnage report of the waste going into the landfill. She would relieve Glenda Rodriguez, the receptionist, for her lunch and breaks.

Marilyn Diaz has been helping Manuel Fresneda since Fresneda was the landfill manager, but she was not his secretary. When Fresneda became the district manager, Diaz asserts, she did not become his secretary because "I didn't have any duties as a secretary for him." On Fridays, Fresneda has asked her to prepare the tonnage report, which she has done. Over the past year and a half that Fresneda has been the district manager, Diaz estimates that she has typed about 10 documents, such as letters or charts, for Fresneda that were generated by, it appears, the tonnage report. The only time that Diaz ever typed anything for Fresneda of a confidential nature was the week before her testimony when Fresneda emailed her a letter to a customer describing the Company's landfill services. The letter contained prices for the services. The record is unclear as to just what Diaz did, or was asked to do, with the email, but Diaz seems to imply that she retyped it in letter form for signing and mailing to the customer. Diaz testified that she has not typed any disciplinary memos for Fresneda.

Before October, Diaz sat in the reception area not far from the district manager's office. Since early October, Diaz has sat in a cubicle in the "back" near Angie Santiago. She apparently was not told to move, for she testified, "I just arrived one day and I decided that I have to move my computer because if I didn't move I wouldn't have a place to work on the payroll." The record does not explain why Diaz, if she had been doing the payroll at her desk in the reception area, could no longer do the payroll at her previous location.

Although Diaz still had possession of the office keys as of the November election, about February 2001 Staff Accountant Gonzalez took control of them, including the keys to the files. Respecting the personnel files, Diaz explains that the file retained in Humacao contains merely "local" items such as the absenteeism record and disciplinary memos. The employment application and other "personnel information" (presumably such matters as medical records) resides in the original personnel file in Caguas. Even so, the Humacao file apparently had the skeleton information needed for the verification letters, and that information would include the date of hire and perhaps the pay rate, although Diaz presumably had the latter information anyhow as a result of her payroll duties.

Although none of the witnesses testified in extensive detail, Marilyn Diaz provided more detail than the other witnesses. She also testified with a more favorable demeanor. To the extent that her testimony conflicts with that of District Manager Fresneda or Human Resources Manager Figueroa, I credit Diaz with one qualification. The qualification arises in the follow manner. It is clear from the direct and cross-examination, and some of the redirect examination of Diaz, that Diaz processed the payroll report in November. However, toward the end of her redirect examination, Diaz testified that under District Manager Fresneda's administration Staff Accountant Gonzalez has received the payroll report with respect to what she has "to pay," and that "currently" she, Diaz, does not know anyone's salary. If she needs salary information currently, Diaz must go to Supervisor Gonzalez who provides that information. There was no recross-examination, and all evidence closed at that point.

This injection, at the end of the trial, of some question as to what the payroll report contained that Marilyn Diaz processed in November not only comes late, but with too little detail to create anything more than a possible question. If the Union intended to elicit information that the November payroll report that Diaz prepared had only names and hours worked, but no pay rates (or no dollar amounts to divide by 40 hours), then that effort lacks sufficient detail. Accordingly, I find that Diaz' work on the payroll as of the November election included at least names, hours worked, and amounts, and probably pay rates as well.

[19] Four line items are left blank as to time spent, and the total of the time listed is 12 hours.

b. Discussion

1. Governing law

Although the Act does not expressly exclude "confidential" employees from the definition of employees, from its beginning years the Board has excluded them from bargaining units. In *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956), the Board, after reexamining its prior rulings on the topic, stated its intention to "adhere strictly" to the definition limiting "confidential" employees to embrace only those employees "who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." (Emphasis in original.) The qualification about the "field of labor relations" came to be known as the "labor nexus" test. See the Board's review in *Kleinberg, Kaplan, Wolff, Cohen & Burrows*, 253 NLRB 450 (1980), of its historical treatment of "confidential" employees.

By its decision in *NLRB v. Hendricks County Rural Electric*, 454 U.S. 170 (1981), the Supreme Court affirmed the Board's interpretation of the Act respecting "confidential" employees, including the restriction that the term applies only to confidential employees with a "labor nexus." The Court endorsed the Board's "labor nexus" test as excluding those whose access to confidential data is merely access to confidential "business information." 454 U.S. at 184–191. Stated differently, nonlabor related matters, even though confidential, are "irrelevant to the determination of whether [a] secretary [is] a confidential employee." 454 U.S. at 191–192. As the Board expressed it in *Intermountain Rural Electric Assn.*, 277 NLRB 1, 4 (1985), enfd. 1988 WL 166520 (10th Cir. 1988):

> Under this definition it is insufficient that an employee may on occasion have access to certain labor related or personnel type information. What is contemplated instead is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it.

In light of *Hendricks County*, supra, that Marilyn Diaz may prepare the payroll (including that for union as well as nonunion employees), or file and maintain absenteeism reports and warning or other disciplinary matters in skeleton personnel files, is "irrelevant." This is so because such matters have no material connection with negotiations for a collective-bargaining agreement. Thus, in *Bakersfield Californian*, 316 NLRB 1211 (1995), the secretary to the retail advertising manager was found, in effect, not to be a "labor nexus" confidential employee, even though she typed and processed payroll and disciplinary matters and grievances and typed the collective-bargaining notes of the retail advertising manager. By contrast, the secretary to the classified advertising manager was excluded from the bargaining unit as a confidential employee because she had access to the manager's labor strategy notes. 316 NLRB at 1211–1213.

Finally, the burden of proof in these cases is on the party (the Company here) challenging the ballot on the basis that the employee is a confidential employee. *Intermountain Rural Electric Assn.*, supra.

2. Application

At trial the focus, practically the exclusive focus, was on the duties of Marilyn Diaz. But her duties are only one of two prongs of the test for confidential employee status. The other prong pertains to the duties of the person or persons for whom she works. As to this latter, the Company failed to establish that District Manager Manuel Fresneda is a person who formulates, determines, and effectuates management policies in the field of labor relations. Even assuming that, as the district manager, Fresneda effectuates such policies, that is not enough. He must formulate and determine such policies, at least in a meaningful way. But there is no evidence that Fresneda is meaningfully involved in formulating and determining such policies. Compare, *E & L Transport Co.*, 327 NLRB 408, 409 (1998) (Terminal Manager O'Reilly formulated and determined such policies by, in part, being responsible for negotiating the collective-bargaining agreement and for suggesting changes to the contract in preparation for upcoming contract negotiations with the union). Accordingly, because the evidence fails to establish this prong of the test, on this ground alone I find that the Company has not carried its burden of demonstrating confidential employee status as to Marilyn Diaz.

Aside from the foregoing finding, I shall go forward as to the duties of Marilyn Diaz. In light of the evidence as to District Manager Fresneda, it is not surprising to find, as I do, that the record fails to establish that Marilyn Diaz is a labor nexus confidential employee. Respecting the payroll matters as of November, and assuming (against any possible question), that Diaz typed the numbers or at least had access to the numbers for unit and nonunit employees, that November payroll function fails the labor nexus test. *Bakersfield Californian*, 316 NLRB at 1211–1212 (typing payroll information is just one of the confidential business matters done by secretary Denise Taylor, but none meets the labor nexus test). Additionally, as the Board ruled in *Lincoln Park Nursing Home*, 318 NLRB 1160, 1164 (1995), "merely having access to files containing confidential material, including records of grievances, does not establish confidential status." Moreover, "the typing of disciplinary matters, grievances, or other material relating to personnel problems" does not render an employee a "confidential employee" within the meaning of Board law. *Lincoln Park*, id. Indeed, to borrow the Supreme Court's terminology from *Hendricks County*, 454 U.S. at 191, all the record evidence here, not being of the labor nexus type, is "irrelevant."

Compare *E & L Transport Co.*, supra (terminal manager's secretary, Judy Nilsen, prepared confidential documents and had regular access to confidential information regarding reports or correspondence documenting the company's position in collective bargaining and labor relations policy matters before this information was transmitted to the union or to the employees at issue—Nilsen held to be a confidential employee); and *Bakersfield Californian*, supra (Patricia Bailey, secretary to the classified advertising manager, excluded from bargaining unit as a confidential employee because of her access to manager's strategy notes for collective bargaining).

Cases cited on brief by the Company to show that Diaz is a confidential employee are similar to the circumstances in either *E & L Transport* or *Bakersfield Californian*. For example, in the lead case cited by the Company, *NLRB v. Rish Equipment Co.*, 687 F.2d 36 (4th Cir. 1982), the court (over a strong dissent by Circuit Judge Hall), enforcing a Board decision in other respects,[20] denied enforcement to the part that included Charlotte Bowers in the bargaining unit over the company's objection that she was a confidential employee with a labor nexus. That decision provides little comfort for the Company here. In that case Branch Manager Gardner (for whom Bowers worked) was "in the thick" of all labor contract matters, "including both negotiations generally and negotiations involving grievances." There was no restriction on Bowers' access "to all records in the office" as Gardner's personal confidential secretary. Even assuming that dissenting Judge Hall's position is correct (that the evidence failed to show that Gardner functioned so as to "formulate and determine" labor policy), there is no evidence here that District Manager Fresneda participated in collective-bargaining negotiations with the Union, or that Marilyn Diaz had any confidential relationship with any labor relations matters that had not already been disclosed to the Union or to affected employees. In any event, to the extent that the Fourth Circuit's decision in *NLRB v. Rish Equipment* does not, as the dissent argues, apply Board law as affirmed by the Supreme Court, I am bound to apply Board law. *Waco*, 273 NLRB 746, 749 fn. 14 (1984).

The Company also cites some Board cases, such as *Associated Day Care Services*, 269 NLRB 178 (1984) (administrative assistants), and *ITT Grinnell*, 253 NLRB 584 (1980) (secretary to [assistant] plant manager). Again, these cases provide no comfort for the Company here, for our record fails to show that District Manager Fresneda does any of this. Thus, in *Associated Day Care* the Board ruled (footnote reference omitted):

> Based on the record evidence, we find that the Employer's administrative assistants are expected to play a role in the investigation of grievances which will affect the decision made by management on the merits of a grievance and that this is sufficient to render them confidential employees. Furthermore, we find that they are expected to have regular access to, and on occasion to type, memoranda concerning management proposals for collective bargaining before these proposals are presented to the Union; we also note that they will regularly see the minutes of the weekly management meetings at which management proposals for collective bargaining will be discussed. While the administrative assistants may spend relatively little of their working time performing these duties, the amount of time devoted to labor relations matters is not the controlling factor in determining confidential status. [Footnote reference omitted.] Accordingly, we shall exclude the classification of administrative assistant from the existing unit. [269 NLRB at 181.]

In *ITT Grinnell*, supra at 585, the Board excluded the secretary to the assistant plant manager from the bargaining unit because the "assistant plant manager has significant responsibility for formulation and effectuation of labor relations policy." Further, "his secretary serves him in a confidential capacity" respecting "labor relations matters."

In our case, so far as the record shows, Marilyn Diaz, as of the November 21 election, neither worked with nor had access to any collective-bargaining documents containing data not yet presented to the Union or to affected employees. Accordingly, finding that the evidence fails to show that Marilyn Diaz was a labor nexus confidential employee as of the November 21 election, I shall recommend to the Board that the Company's challenge to her ballot be overruled and that her ballot be counted.

5. Summary of recommendations in Case 24–RC–8138

Based on the foregoing findings, I have recommended to the Board that all three challenges be overruled and, consequently, that the ballots of Blanca Santana, Keila Ramos, and Marilyn Diaz be opened and counted. I further recommend that a revised tally of ballots be prepared and served, and that an appropriate certification issue in Case 24–RC–8138.

CONCLUSIONS OF LAW

1. By coercively interrogating its employees about their union activities, threatening them with various economic sanctions in the event they voted for Union de Tronquistas de Puerto Rico, Local 901, IBT, AFL–CIO (Union), to be their collective-bargaining representative, by implicitly soliciting employee complaints and grievances during a union organizing campaign, by creating the impression among its employees that their union activities were under surveillance by the Company, and by requesting an employee to spy on the union activities of her fellow workers, to identify the union supporters, to note what they were saying about the Union, and impliedly to report that information to District Manager Manuel Fresneda, the Company violated Section 8(a)(1) of the Act.

2. By discharging Blanca Santana on October 26, 2000, the Company violated Section 8(a)(3) and (1) of the Act.

3. The Company has not violated the Act as otherwise alleged in the February 28, 2001 complaint, as amended.

4. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Company, having discriminatorily discharged an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Company also must remove from its files any reference to the unlawful discharge of Blanca Santana, and thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

[20] *Rish Equipment Co.*, 258 NLRB 1139 (1981).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Company, E. C. Waste, Inc. d/b/a Waste Management de Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities; threatening them with various economic sanctions should they vote for Union de Tronquistas de Puerto Rico, Local 901, IBT, AFL–CIO, or any other labor organization, to be their collective-bargaining representative; implicitly soliciting employee complaints and grievances during a union organizing campaign when there is no past practice of such during a time when no organizing campaign is in progress; creating the impression among employees that their union activities are under surveillance by the Company; or requesting an employee to spy on the union activities of their fellow workers, to identify the union supporters, to note what they are saying about the Union, and impliedly to report that information to management.

(b) Discharging or otherwise discriminating against any employee for supporting Union de Tronquistas de Puerto Rico, Local 901, IBT, AFL–CIO, or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Blanca Santana full reinstatement to her former job or, if that job no longer exists, reinstatement to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make whole Blanca Santana for any loss of earnings and other benefits suffered as a result of the unlawful action against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Blanca Santana, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, that the Board or its agents deems necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its office at Humacao, Puerto Rico, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Company's authorized representative, shall be posted by the Company and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or ceased its operation at the facility involved in this proceeding, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since October 18, 2000.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Company has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."